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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

EXXON CORPORATION-Petitioner
vs.
FEDERAL TRADE COMMISSION-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Court of Appeals can deny a Petitioner its right to pre-enforcement judicial review of an illegal substantive rule promulgated by the Federal Trade Commission in the face of a statutory provision granting such a right.

2. Whether the conflict between the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court, as well as other Courts of Appeals, as to the scope and meaning of the "mootness" doctrine should be resolved.

PARTIES

Exxon Corporation appeared as a petitioner before the United States Court of Appeals for the Ninth Circuit.* The party appearing as respondent was the Federal Trade Commission.

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* (a) In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, Exxon Corporation has no parent companies, subsidiaries or affiliates to report.

(b) Additional parties appearing as petitioners before the United States Court of Appeals for the Ninth Circuit at the time of the judgment which petitioner seeks to have reviewed were: Atlantic Richfield Company; Chevron Chemical Co., et al.; Chevron U.S.A., Inc.; Getty Refining & Marketing Company; Gulf Oil Corporation; Kerr-McGee Refining Corporation; Mobil Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Sinclair Marketing, Inc.; Standard Oil Company of California; Standard Oil Company (Indiana); and Union Oil Company of California. Other parties appearing as petitioners at the time the litigation was consolidated in the United States Court of Appeals for the Ninth Circuit: American Motors Corporation; Chrysler Corporation; Farm & Industrial Equipment Institute; Ford Motor Company; Freightliner Corporation; General Electric Corporation; General Motors Corporation; International Harvester Company; Marathon Oil Company; Motor Vehicle Manufacturers Association; Paccar, Inc.; Schwinn Bicycle Company; Snap-on Tools Corporation; Volkswagen of America, Inc.; White Motor Corporation; and Automobile Importers of America, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ———

IN RE: FTC FRANCHISE
DISCLOSURE RULE REVIEW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals dismissing this litigation, which is reproduced at Appendix A, is unreported.[1] The denial of the Petition for Rehearing is reproduced at Appendix D and is unreported. The Federal Trade Commission's July 17, 1980 Exemption Order is reproduced at Appendix B and is published at 45 Fed. Reg. 51,765 (1980).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit dismissing this litigation was entered on November 6, 1980, and an order denying rehearing was entered on February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

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[1] The Notice of Entry of Judgment is reproduced at Appendix C.

PERTINENT STATUTES AND REGULATIONS

The following statutes and regulations are involved in this case: Section 18 of the Federal Trade Commission Act, as amended by the Magnuson-Moss Act, 15 U.S.C. § 57a (1976 & Supp. III 1979); and a Federal Trade Commission Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. § 436 (1980).

Judicial review of substantive FTC trade regulation rules is provided by Section 18(e)(1)(A) of the Federal Trade Commission Act, as amended by the Magnuson-Moss Act, which states:

> (e)(1)(A) *Not later than 60 days after a rule is promulgated* under subsection (a)(1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of title 28, shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979).

Jurisdiction to consider challenges to Federal Trade Commission trade regulation rules is granted to United States Courts of Appeals under Section 18(e)(5)(B) of the Federal Trade Commission Act which provides:

> (B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain

> judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

15 U.S.C. § 57a(e)(5)(B) (1976 & Supp. III 1979).

The aforementioned statutory provisions and regulation are printed in their entirety in Appendix E.

STATEMENT OF THE CASE

Petitioner seeks to enforce its Congressionally mandated right to obtain pre-enforcement judicial review of the Federal Trade Commission's ("FTC" or "the Commission") illegally promulgated "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities Ventures" ("Franchise Rule" or "Rule"), 16 C.F.R. § 436 (1980). The Franchise Rule is one of the few economy-wide rules ever promulgated by the FTC, affecting the very structure of American business.[2] It was illegally promulgated through highly unfair procedures whereby certain businesses were provided favored treatment by the FTC in numerous secret *ex parte* meetings with Commissioners and the rulemaking staff. Because of the 60-day limit on pre-enforcement appeals, 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979), this litigation may provide the only opportunity for a full resolution of the serious evidentiary and pro-

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[2] The FTC has described the Franchise Rule as "one of the Commission's first attempts to regulate recurring practices on an industry-wide basis." An FTC staff memorandum projected that the Rule would affect more than $248 billion in sales each year.

cedural questions about the validity of the Rule. Yet, the Order dismissing this litigation, issued by the Court of Appeals for the Ninth Circuit, has left Petitioner without any resolution of, or perhaps without any remedy as to these important issues, which Petitioner raised in the statutorily prescribed manner.

A. The Franchise Rule

Briefly stated, the Franchise Rule, through the vehicle of twenty burdensome interrogatories (with numerous subparts), purports to require certain persons engaged in what the FTC labels franchising to assemble vast amounts of information, and to print, disseminate and periodically update voluminous disclosure prospectuses, much like the disclosure laws enacted by Congress which govern the issuance and sale of securities. Additional detailed disclosures must be made, under the second section of the Rule, if that person makes certain representations concerning profits, income or sales. The final section of the Rule contains a number of prohibitions on disclosures which the FTC considers to be unfair or deceptive practices, as purportedly demonstrated by the record. The Franchise Rule and proposed Guides were first published in the Federal Register on December 21, 1978, 43 Fed. Reg. 59,614, announcing an effective date for the Rule of July 21, 1979.

B. Proceedings Below

More than a dozen petroleum companies appealed the Franchise Rule shortly after it was promulgated under the authority of 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979); their appeals were consolidated in the Ninth Circuit on May 18, 1979.[3] After the 60-day statutory period for direct appeals had run, the FTC's strategy

[3] The United States Court of Appeals for the Ninth Circuit had jurisdiction to consider this appeal under 15 U.S.C. § 57a(e)(5)(B) (1976 & Supp. III 1979).

for avoiding judicial review of the Franchise Rule began to crystallize. First, court action on requests to the FTC for a stay of the Rule's operation was delayed for months at the request of the FTC during oral argument in June, 1979. The Commission accomplished this by suspending the July 21, 1979, effective date of the Rule and requesting that the stay motions be suspended until final Guides to the Rule were completed.

Under the Rule's original definition of franchising, any "required payment" by a "franchisee" in excess of $500 during the first six months triggered the Rule's disclosure requirements if the definitional criteria were met. The draft Guides, as well as the final Rule, had included inventory purchases in the category of so-called "required payments." However, when the final Guides became effective, along with the Rule, on October 21, 1979, 44 Fed. Reg. 49,966 (1979), they recognized for the first time an exclusion from the Rule's required payments criterion for reasonable amounts of inventory purchased at *bona fide* wholesale prices. This expedient compromise was agreed upon in *ex parte* conferences with favored litigants. The *bona fide* inventory exception caused numerous petitioners to drop out of the litigation.

The FTC undertook systematically to avoid a review of the validity of the Rule by eliminating the remaining petitioners in side agreements in which the Commission offered favorable advisory opinions going to the issue of coverage and applicability of the Rule to various businesses of the petitioners in return for stipulations from those petitioners to drop their appeals. Although very effective, these tactics were unsuccessful in totally deflecting a merits review. Petitioner and certain remaining additional companies continued to push for a review of the validity of the Rule with a Ninth Circuit panel hearing oral argument on the merits of the case in January, 1980. During the course of oral argument the

FTC switched tactics. With the possibility that the entire Rule might be declared null and void, the FTC urged the court to delay ruling on the Rule's validity until the Commission could act on a pending petition for exemption which had been filed by the petroleum companies many weeks earlier in October, 1979. In briefs and letters, counsel for the FTC assured the court and the petroleum company petitioners that the exemption, if granted, would be complete and unconditional, thereby obviating the need for further court consideration of this case. On April 8, 1980, the FTC temporarily exempted *all* of petitioners' business operations until the exemption proceeding could be completed. The Ninth Circuit neither granted nor denied the FTC's stay request—it simply did not rule on the case for months.

Following receipt of overwhelmingly favorable comments from the petroleum industry urging a complete exemption, the FTC issued an exemption order on July 17, 1980. But the Exemption Order did not fulfill the expectations generated by the FTC's promises to the Ninth Circuit. Although the Exemption Order excluded from the Rule's coverage motor fuel and all related operations, it provided no exclusion from the Franchise Rule's application for various other businesses engaged in by Petitioner, such as aviation fuel sales, marina fuel sales and liquid petroleum gas sales. These operations and others continue to be subject to the Franchise Rule, according to the FTC.

On September 30, 1980, the FTC issued an Advisory Opinion to Marathon Oil Company, stating that all activities normally considered to be an "integral part of service stations" were exempt. As to various non-exempt operations, the FTC advised Marathon that as presently conducted these remaining operations were not covered by the Franchise Rule because they were not presently being conducted as franchises. The Advisory Opinion

removed one more party to the litigation, narrowing the field of petitioners seeking a review of the Rule's validity.

Spurred on by statements made by the Commission staff that their non-service station operations were not *exempt* from the Rule, Petitioner and the other petroleum companies continued to pursue their challenge to the validity of the Rule. In response, the FTC pursued its effort to avoid judicial review of the validity of the Franchise Rule. The Commission vigorously argued that the case was moot because the remaining petitioners had been primarily concerned about the costly effect of the Rule on their service station operations when they originally appealed the Rule, and those operations and all related businesses were now exempt. The FTC deflected the issue of the Rule's *validity* by offering its counsel's opinion that the remaining businesses of petitioners as presently operated did not appear to be *covered* by the Rule.

On November 6, 1980, the Court of Appeals for the Ninth Circuit dismissed the case. Ignoring both the Petitioners' substantive right to pre-enforcement review and the 60-day limit on direct appeal review of the validity of an FTC rule, the court stated that when an issue arises "concerning the sale of franchises other than service stations, then that matter can be litigated anew." On February 9, 1981, the court denied the petition for rehearing filed by the petroleum companies. The court also declined to clarify the serious questions left open by its Order. Despite two and a half years of costly litigation and an express statutory right to judicial review, the illegal Franchise Rule remains unreviewed and in full force.

Under the precedent established by the Ninth Circuit, any agency concerned about the possible invalidity of a

rule it has promulgated can employ a range of dilatory and obfuscatory devices, including partial exemptions, non-binding interpretative guides and non-binding advisory opinions in order to prevent a party from obtaining judicial review of the validity of an illegal rule.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER A COURT CAN DENY THE RIGHT TO PRE-ENFORCEMENT JUDICIAL REVIEW IN THE FACE OF A STATUTORY PROVISION GRANTING SUCH A RIGHT

The dismissal of this litigation by the Court of Appeals for the Ninth Circuit eviscerated the statutorily granted pre-enforcement review as a control on agency regulatory action, a role which both the Supreme Court and Congress have long recognized and carefully protected as a matter of general administrative law and, specifically, as a role deemed essential by Congress in enacting the FTC's substantive rulemaking power. It was in recognition of the importance of judicial review of agency action that the Supreme Court held that such review should not be precluded in the absence of clear Congressional intent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), *cited with approval in Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962).[4] Congress codified this principle in section 701 of the Administrative Procedure

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[4] The Supreme Court's recognition of the importance of judicial review can be traced back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), where Chief Justice Marshall asked:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Act, 5 U.S.C. § 701 (1976), which provides that agency action is subject to judicial review except where there is an express statutory prohibition and except where "agency action is committed to agency discretion by law." *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

Judicial review of agency action is essential, not only to protect the rights of private litigants, but to insure that an agency does not exceed the limits of the regulatory authority delegated to it by Congress. *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971). The paramount objective of judicial review of an agency standard is to insure that the agency has performed its essentially legislative task in a manner guaranteed to prevent arbitrariness and irrationality. *Automotive Parts & Accessories Association* v. *Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). Petitioner, if given a full opportunity to demonstrate the merits of its challenge to the validity of the Franchise Rule, would clearly demonstrate that the FTC exceeded its regulatory authority in precisely the manner which judicial review is designed to prevent. This was shown at oral argument and in briefs on the validity of the Rule where it was demonstrated that the FTC compiled over ten thousand pages of *ex parte*, non-public record comments on the Franchise Rule (among other glaring defects in the Rule's promulgation). For purposes of this Petition, the Court should assume that Petitioner can demonstrate all the abuses set forth in its petition for review before the Court of Appeals for the Ninth Circuit. *National Metropolitan Bank* v. *United States*, 323 U.S. 454, 457 (1945). *See also Cash* v. *Commissioner*, 580 F.2d 152, 154 (5th Cir. 1978); *Wager* v. *Pro.*, 575 F.2d 882, 884 (D.C. Cir. 1976).

Because the statute here provides for limitations on the scope of review other than in a direct review pro-

ceeding, the dismissal of Petitioner's case undoubtedly hampers and places at risk the ability of Petitioner or anyone else to raise the full range of questions about the validity of the illegal Franchise Rule in subsequent judicial proceedings. 15 U.S.C. § 57a(e)(5)(C) (1976 & Supp. III 1979). The FTC has contended in this litigation, as well as in other cases, that the scope of review in a direct appeal pre-enforcement proceeding, 15 U.S.C. § 57a(e)(3) (1976 & Supp. III 1979), is broader than in an enforcement proceeding, 5 U.S.C. § 706 (1976). If correct in these assertions, Petitioner may never again be able to challenge the Franchise Rule on "substantial evidence" grounds, or on grounds that serious procedural errors were committed by the FTC during the process which resulted in the Franchise Rule's promulgation.

The Ninth Circuit's Order dismissing this litigation sanctions the FTC's thinly disguised efforts to evade judicial constraints on its rulemaking authority which the statute incorporated as a check on arbitrary and overbroad Commission rules. The FTC altered some of the Franchise Rule's requirements, used Advisory Opinions and a partial exemption in order to eliminate all of the parties who filed challenges to the Rule, thereby avoiding a review of the Rule's validity.

Permitting the Ninth Circuit's Order to stand unreviewed, under these circumstances, seriously undermines the role of courts as a check on agency action in the manner mandated by the Magnuson-Moss Act. The Ninth Circuit's dismissal of this action provides the FTC and other agencies with the same type of invitation to disregard statutory requirements and to exceed the powers conferred on them by Congress unchecked by the courts as condemned in *Ralpho* v. *Bell*, 569 F.2d 607, 617 (D.C. Cir. 1977).

Recent decisions in other courts of appeals regarding the FTC's exercise of its substantive rulemaking powers illustrate the special need for judicial scrutiny of the FTC's substantive rules. In *Katherine Gibbs School* v. *FTC*, 612 F.2d 658 (2d Cir. 1979), the court undertook direct pre-enforcement review of the first substantive rule promulgated by the FTC under Section 18 of the Magnuson-Moss Amendments, which codified the FTC's authority to promulgate substantive rules to prohibit unfair trade practices.[5] The rule in question, relating to "Proprietary Vocational and Home Study Schools," 16 C.F.R. § 438 (1980), was designed to regulate unfair and deceptive advertising, sales and enrollment practices engaged in by some of these schools. The court held that the FTC had exceeded its authority in promulgating this rule, in that the agency, *inter alia*, had failed to define with sufficient specificity those acts or practices considered to be unfair. The court specifically rejected an FTC argument that judicial review of its rules was to be as limited under the Magnuson-Moss Act as it had been previously, stating that Congress obviously intended that a Commission rule should not receive judicial approval unless the agency's action was supported by substantial evidence on the record. *Id.* at 663-64.

In *American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir. 1980), another appellate court undertook direct pre-enforcement review of an FTC rule, determining that the FTC had exceeded its regulatory authority. The rule in question was designed to curtail the ability of states and professional associations to restrict or

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[5] Like the Franchise Rule, the FTC had started to consider the need for the Vocational School Rule prior to the passage of the Magnuson-Moss Amendments. In marked contrast to the FTC's determination to ignore the procedural rights conferred by the new legislation in its promulgation of the Franchise Rule, the Commission altered its hearing procedures for the Vocational School Rule to conform with the new legislation subsequent to its passage.

burden the advertising of eye examinations or of opthalmic goods and services. The decision was again based on the court's conclusion that, *inter alia*, the rule was not supported by sufficient evidence. In reaching its decision, this court also noted the importance which Congress had attached to pre-enforcement judicial review as a control on the FTC's broad rulemaking authority.

The concern which these courts evidenced about the need to carefully review the FTC's exercise of its regulatory authority mirrors the fact that the statutorily mandated judicial review was central to Congress' decision to codify the FTC's rulemaking authority in the Magnuson-Moss Act following the decision in *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). The court there had held that the FTC had the authority to promulgate substantive rules under Section 6(g) of the old Federal Trade Commission Act, 15 U.S.C. § 46(g), but left open the question of what procedural safeguards would be needed and the scope of judicial review. These doubts were a central concern of Congress in subsequently codifying the FTC's rulemaking authority. As the House Committee considering the Magnuson-Moss Amendments wrote:

> Because of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices," *the committee believes greater procedural safeguards are necessary.* Accordingly it has fashioned the rulemaking procedures and *judicial review provisions* described below which we believe to be more appropriate in this context than merely relying upon the provisions of sections 553 and 706 of Title 5.

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 45-46 (1974) (emphasis added).

Congressman Broyhill, a member of the Conference Committee, stated in floor debates that thorough judicial review was perceived to be a key check on the exercise of the FTC's rulemaking authority:

> We are quite frankly relying in this area on two factors: the commonsense and fairness of the FTC, and, of course, *the review function of the courts, which are not to affirm rules if, among other things, the FTC's handling of rebuttal evidence and cross-examination has prevented full disclosure of material issues of fact and this prevented a fair determination of the entire proceedings.*

120 Cong. Rec. H12,348 (daily ed. Dec. 19, 1974) (emphasis added). It is these important procedural challenges specifically highlighted in Congressman Broyhill's statement, that may be permanently lost as a result of the Ninth Circuit's decision.

Congress' belief as to the importance of judicial review was fortified by its enactment of comprehensive, direct appeal procedures for all substantive rules promulgated by the FTC. 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979). Petitioner brought this action in the statutorily specified manner and is undeniably entitled to judicial review. The Ninth Circuit's decision to dismiss this litigation has left Petitioner with an exemption from the illegal Franchise Rule as to only limited portions of its business operations, and with no assured method of obtaining the broad procedural and evidentiary review which Congress considered to be so important, as to the remainder of its business operations.[6]

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[6] Indeed, this litigation probably provides the only opportunity for any pre-enforcement judicial review of the Franchise Rule. One panel of the Court of Appeals refused to permit Ashland Oil Company to intervene in this litigation after the 60-day statutory period had run. In *National Auto. Dealers Ass'n* v. *FTC*, 421 F. Supp. 31, 35 (M.D. La. 1976), plaintiff's suit for injunctive relief to restrain the enforcement of a rule promulgated under § 18(a)(1)

The Court of Appeals' determination to dismiss this case "without prejudice to the right of the petitioners to contest the validity of the Rule" if a controversy arises as to any business not included within the exemption is ineffective as a practical matter, since there are no apparent procedures to reopen appellate cases after the time for petitioning for rehearing expires, and it may be incorrect as a legal proposition. *See United States* v. *Michigan National Corp.*, 419 U.S. 1 (1974). There exists a serious question whether the court of appeals has the power to enlarge its jurisdiction of its own accord by extending the 60-day statutory period. *Thiokol Chemical Corp.* v. *Burlington Industries, Inc.*, 313 F. Supp. 253, 254-55 (D. Del. 1970), *aff'd*, 448 F.2d 1328 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). *Accord, Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 330 (5th Cir. 1979); *Basso* v. *Utah Power & Light Co.*, 495 F.2d 906, 910 (10th Cir. 1974).

The only other way in which Petitioner may be able to challenge the validity of the illegal Franchise Rule is to risk $10,000 per day penalties in the context of an enforcement proceeding. This option is certainly not "without prejudice" to Petitioner, which would not only have to risk the substantial penalties of noncompliance in order to obtain judicial review, but, as discussed above, may lose the ability to raise crucial challenges to the validity of the Rule as well.

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of the FTC Act, as amended by the Magnuson-Moss Act, was dismissed on the ground that such review would only be available in an action filed in a Court of Appeals within 60 days of the promulgation of the Rule. *See also Marathon Oil Co.* v. *FTC*, 1980-1 Trade Cas. (CCH) ¶ 63,177 (N.D. Ohio 1980), where the court dismissed Marathon's suit for declaratory relief on the narrow issue of applicability of the Franchise Rule.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER A PARTIAL EXEMPTION FROM A CHALLENGED RULE RENDERS MOOT A CHALLENGE TO THE VALIDITY OF THAT RULE

A. The Court of Appeals' Decision Is in Conflict With the Decisions of This Court

The Ninth Circuit's decision to dismiss this litigation is in direct conflict with this Court's decisions on the mootness doctrine, which establish that a case only becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). *Accord, North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). As this Court has repeatedly explained, as long as the challenged activity remains in force, and continues to impact on the challenging parties, a case is not moot. The Court illustrated this principle in *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 202-03 (1968), in which the government had filed a civil antitrust suit against an association and its member firms, contending that they had illegally conspired on bids for 11 sales of concentrated phosphate to the government. The Court rejected an argument that a new Agency for International Development regulation mooted the case, pointing out that the new regulation did not apply to all the contracts on which the former members of the association might bid. This situation cannot be distinguished from an exemption which does not apply to all of Petitioner's business operations as a basis for declaring a case to be moot.

Petitioner challenged the validity of the Franchise Rule. The Rule continues to exist; its validity remains untested; and the FTC has never varied from the position that the Rule controls any aviation fuel, marine fuel and similar franchises of Petitioner. As long as

the challenged activity remains in force, as it does here, Supreme Court precedent dictates that the litigation go forward. *See also Gray* v. *Sanders*, 372 U.S. 368, 376 (1963).

The July 1980 Exemption Order has no effect on the validity of the Rule, the issue here. The FTC remains at liberty to enforce the Rule as to non-exempted businesses. In fact, the Commission has just concluded its first enforcement action, obtaining a substantial default judgment. *FTC* v. *H. N. Singer, Inc.*, Civ. No. 80 3068 (N.D. Cal. Mar. 24, 1981). In this context, it is clear that the decision of the Court of Appeals to dismiss this case as moot is not supportable under applicable Supreme Court precedent.

More specifically, the Ninth Circuit's dismissal of this litigation is fundamentally inconsistent with the well established principle that voluntary cessation of challenged conduct does not render a controversy moot. Justice Clark explained the rationale underlying this principle nearly thirty years ago in *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953), stating

> [t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion . . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

(Footnote omitted.) This principle has been repeatedly reaffirmed and applied by this Court. *See, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979); *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974); *United States* v. *Concentrated Phosphate Export Association*, *supra* at 203; *Gray* v. *Sanders*, *supra* at 376; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944);

United States v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308-10 (1897). Yet the decision by the Ninth Circuit to dismiss this litigation provides the FTC and all other agencies with the "powerful weapon" of non-binding advisory opinions and partial exemptions to evade judicial review.

The Supreme Court, in *County of Los Angeles* v. *Davis*, *supra* at 631, recently established two conditions which must be met if voluntary cessation of challenged conduct is ever to lead to mootness. First, the party claiming mootness must establish that there is no "reasonable expectation" that the alleged violation will recur. *See also SEC* v. *Medical Committee For Human Rights*, 404 U.S. 403 (1972). The opposite expectation is present in this litigation.

The second condition imposed by the Supreme Court which a party seeking to establish mootness must show is that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles* v. *Davis*, *supra* at 631. *See also DeFunis* v. *Odegaard*, *supra* at 317-18; *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973). The FTC has clearly not satisfied this condition. The FTC staff contends that the exemption extended only to service station and related operations.

In *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), the Supreme Court considered a case analogous to this litigation. *Super Tire* involved a suit for injunctive and declaratory relief by certain employers to have a New Jersey state statute granting public assistance to workers engaged in a strike invalidated. The employers argued that the state legislation undermined their bargaining position, thus interfering with federal

labor policy of free collective bargaining as expressed in the Labor Management Relations Act. The specific labor dispute which had sparked the suit was settled before the case could be tried. The Court held that, although the case for an injunction dissolved, the need to determine the validity of the state legislation remained. The Court reasoned:

> [T]he challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing or brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

Id. at 122.

This litigation satisfies all the criteria set forth in the *Super Tire* case. The "brooding presence" of the Franchise Rule forces Petitioner either to comply with a Rule which it contends is invalid, or risk the possibility of a penalty of $10,000 per day per violation.

Even assuming, *arguendo*, that this litigation did not fit squarely within the precedent set forth above establishing that this case is not moot, the Ninth Circuit's decision would be fundamentally inconsistent with the exception to the mootness doctrine which the Supreme Court has established in situations where the challenged conduct would be "capable of repetition, yet evading review." First set forth in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), this Court has continued to recognize this exception. *See, e.g., Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Sosna* v. *Iowa*, 419 U.S. 393, 399-400 (1975); *DeFunis* v. *Odegaard*, *supra* at 318-19; *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). If the Ninth Circuit's decision is permitted to stand, the FTC will have shown just how readily judicial review of

an illegal agency rule can be evaded. Further, as for review of the validity of the Franchise Rule itself, the Ninth Circuit's decision may well permit total evasion of the review which Petitioner seeks to obtain in this action.

The FTC argued that the mootness doctrine applied by contending that Petitioner had never admitted that any of its other business operations are covered by the Rule; and the Ninth Circuit apparently accepted this argument. Such a concession, given the potential statutory penalties, is too exacting a price to demand from a party seeking to obtain judicial review. *Abbott Laboratories* v. *Gardner*, *supra*. Such a concession is clearly greater than that required under the statute which requires only that the party be "interested," and, in fact, gives the power to obtain judicial review to mere consumers. 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979). It is enough that the FTC, the agency which has the responsibility of enforcing this litigation, has informed Petitioner's counsel that certain of its businesses may fall under the Rule. To deny Petitioner judicial review in this situation is to ignore well established Supreme Court precedent on mootness and to contravene clear statutory language.

B. The Court of Appeals' Decision Is in Conflict With the Decisions of Other Circuits

The decision of the Court of Appeals for the Ninth Circuit stands in marked contrast with the line of cases in other circuits holding that a challenge to agency authority is not mooted by the disappearance of the immediate controversy as long as a reason remains to resolve the subsisting challenge to the agency's conduct. *See Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977); *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d 16 (6th Cir. 1975),

cert. denied, 425 U.S. 934 (1976); *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390, 404 (5th Cir. 1974), *rev'd on other grounds sub nom. Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); *Nader* v. *Volpe*, 475 F.2d 916 (D.C. Cir. 1973).

Bethlehem Steel Corp. v. *Train*, *supra*, involved an attempt to get judicial review of an order issued by the Administrator of the EPA. The EPA had issued a permit to Bethlehem containing certain effluent limitations and schedules which required compliance by June, 1977. The earliest date by which Bethlehem could meet the prescribed levels was July, 1979. Thereafter, the EPA indicated that it had no intention of bringing an action against Bethlehem for its inability to comply. The court held that the litigation was not moot because the EPA could not foreclose the possibility of a suit against Bethlehem in the future. Similarly, in light of the FTC's statements that certain of Petitioner's businesses may be covered by the Franchise Rule, the Court of Appeals cannot foreclose the possibility of a later enforcement suit against Petitioner involving one of its non-service station related operations such as its aviation fuel operations.

The Sixth Circuit rejected mootness as a basis for dismissing a similar case in *Big Rivers Electric Corp.* v. *EPA*, *supra*. Petitioner in that case sought to challenge a Clean Air Act regulation granting the Administrator of the EPA the authority to approve alternate standards for emission controls proposed by a state. At the time of the court's consideration of the mootness issue, the specific state regulation which had sparked the litigation was no longer in effect. The court held that the litigation was not moot because the subsisting challenge to the authority of the EPA Administrator, as set forth in the Clean Air Act amendment, remained. In the

case before the Ninth Circuit, the challenge to the validity of the Franchise Rule survived the partial exemption granted by the FTC, as did the FTC's claim that certain of Petitioner's businesses may be covered.

A similar question was placed before the Fourth Circuit in *Natural Resources Defense Council, Inc.* v. *EPA*, *supra*. That litigation also involved an attempt to obtain judicial review of an order of the Administrator of the EPA approving, *inter alia*, the use of tall stack controls as air quality controls. While this litigation was pending, EPA wrote a letter to the Governor of Georgia stating that Georgia's proposed tall stack controls were no longer considered to be acceptable. The letter made it clear, however, that a tall stack control plan more limited in breadth would be acceptable. The court held that the letter did not moot the litigation as the EPA continued to endorse the tall stack control approach to protecting the air quality. Although the FTC has partially exempted Petitioner from the Franchise Rule in this litigation, the requirements of the Rule, which the FTC asserts is applicable to Petitioner's non-service station operations, remain in effect.

In *Nader* v. *Volpe*, *supra*, the District of Columbia Circuit Court refused to reach a determination of mootness on similar facts. Plaintiff in that case alleged that Volpe had exceeded his authority under the National Traffic and Motor Vehicle Safety Act of 1966 by granting Checker Motors Corporation a temporary exemption from the effective date of a Motor Vehicle Safety Standard. The exemption was withdrawn before the court could resolve this issue, and Checker Motors proceeded to comply with the standard. The court determined that the litigation was not moot, concluding that if withdrawal of the exemption led to mootness, courts would be prevented from "ever deciding the important question of whether or not the Secretary has authority to issue

such exemptions." *Id.* at 917. Similarly, if a partial exemption can be used to moot a direct appeal of a rule promulgated by the FTC, the kinds of important procedural and evidentiary challenges raised in this litigation may never be resolved in any litigation challenging an FTC Rule.

The Supreme Court should review this issue in order to resolve the conflict between the Ninth Circuit and the many other circuits which have addressed this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 11, 1981

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 78-3680 et al.

IN RE: FTC FRANCHISE DISCLOSURE RULE REVIEW

ORDER

Before: KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS,* District Judge.

Upon due consideration, the court makes the following orders respecting the consolidated cases:

1. The Commission and Marathon Oil Company having so stipulated, the petition in *Marathon Oil Company* is dismissed without prejudice, the parties to bear their own costs.

2. The court grants the motion of the Federal Trade Commission to dismiss the pending petitions for review by the Petroleum Company Petitioners. The Commission has completely and unconditionally exempted from the operation of the rule the service station franchise operations of the Petroleum Company Petitioners. If a case or controversy arises concerning the sale of franchises other than service stations, then that matter can be litigated anew. The petitions for review by the Petroleum Company Petitioners accordingly are dismissed, without prejudice to the right of the petitioners to contest the validity of the rule or its application in any appropriate future proceeding. All parties will bear their own costs.

[Entered on November 6, 1980]

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* Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

IN THE MATTER OF

Petitions for Exemption from Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" filed by Shell Oil Company, Atlantic Richfield Company, Exxon Corporation, Mobil Corporation, Union Oil Company of California, Standard Oil Company (Indiana), Getty Refining & Marketing Company, Gulf Oil Corporation, Kerr-McGee Refining Corporation, Inc., Standard Oil Company of California, Chevron U.S.A., Inc., Chevron Chemical Company, Phillips Petroleum Company, Crown Central Petroleum Corporation, Ashland Petroleum Company, Standard Oil Company, Sinclair Marketing, Inc., National Oil Jobbers Council, Illinois Petroleum Marketers Association and Texas Oil Marketers Association.

ORDER GRANTING EXEMPTION

On April 18, 1980, the Commission published a notice in the Federal Register soliciting comments on petitions filed by the National Oil Jobbers Council, Illinois Pe-

troleum Marketers Association and Texas Oil Marketers Association, all on behalf of their members, and by Shell Oil Company, Atlantic Richfield Company, Exxon Corporation, Mobil Corporation, Union Oil Company of California, Standard Oil Company (Indiana), Getty Refining & Marketing Company, Gulf Oil Corporation, Kerr-McGee Refining Corporation, Standard Oil Company of California, Chevron U.S.A., Inc., Chevron Chemical Company, Phillips Petroleum Company, Crown Central Petroleum Corporation, Ashland Petroleum Company, Standard Oil Company and Sinclair Marketing, Inc. The petitions sought an exemption, pursuant to Section 18(g) of the Federal Trade Commission Act, from coverage under the Commission's trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures."

Section 18(g) of the Act provides that an exemption to a trade regulation rule may be granted if coverage is "not necessary to prevent the unfair or deceptive act or practice to which the rule relates." In accordance with Section 18(g) the Commission conducted an exemption proceeding under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. Following the close of the public comment period on May 19, 1980, the Commission reviewed the petitions, and the public comments received in response to the Federal Register notice. Applying the standard for exemption prescribed by Section 18(g) of the Act, the Commission has concluded that an exemption should be granted as hereinafter described.

The most frequently cited complaint about practices in the petroleum franchise relationship that are part of the Commission's initial rulemaking record involved termination and non-renewal practices.[1] The Commission

[1] Of the 11 complaints in the original rulemaking record dealing with petroleum company abuses, 10 specifically mention insufficient notice of, and grounds for, termination and non-renewal. *E.g.*,

chose to remedy these practices by requiring pre-sale disclosure, on the theory that if prospective franchisees know the relevant facts, they can make an informed decision about the potential benefits and risks of their proposed investment. Thus, the Commission did not dictate specific changes in the relationship to eliminate any specific practices; rather, the Commission chose to publicize the practices in the belief that the parties, between themselves and operating on the basis of relevant information, could resolve any problems.

Subsequent to the close of the rulemaking record in 1974, Congress passed the Petroleum Marketing Practices Act ("PMPA") 15 U.S.C. § 2801 *et seq.* (Supp. II, 1978), effective in June 1978, which specifically regulates the manner in which a petroleum company may terminate or fail to renew an existing franchisee. The PMPA requires pre-sale disclosure to new franchisees of the franchisor's rights to terminate the relationship, and post-termination disclosure of the franchisee's rights under the PMPA to contest the termination. In addition, the PMPA imposes substantive limitations on the termination of dealership agreements entered into after an initial trial franchise with new dealers. The PMPA embodies the Congressional response to the same practices which concerned the Commission. Congress chose to remedy the abuses it found by means of the alternative strategy of dictating a substantive mechanism to mitigate the problem, and by requiring disclosure of termination rights. The Commission also notes that substan-

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Comments of Retail Gasoline Dealers' Association, Inc., of Massachusetts, R. II, 2793; Independent Oil Men's Association of New England, Inc., R. II, 2815; Georgia Association of Petroleum Retailers, Inc., R. II, 697; New Jersey Gasoline Retailers Association, R. II, 684; National Congress of Petroleum Retailers, Inc., R. II, 382, 501, 693; R. IV, 1933. [All citations to the rulemaking record follow the format adopted in the Statement of Basis and Purpose for the franchise rule. 43 Fed. Reg. 59622 n. 9 (Dec. 21, 1978).]

tive regulations promulgated by the Department of Energy since the close of the initial rulemaking record regulate the allocation of gasoline supplies as well as the price of gasoline to franchisees. The PMPA and DOE regulations appear to have reduced the incentive and means for continued abuses of the kind documented in the original record.

Some of the comments[2] opposing the exemption petition correctly assert that neither the PMPA, the Department of Energy regulations, nor any other federal regulations provide prospective franchisees with the disclosure mandated by the rule. However, these other federal mechanisms cited above are directed at the same goal as the franchise rule; *i.e.*, mitigating the deceptive or unfair practices, but by different means; *i.e.*, direct intervention through substantive regulation (and limited disclosure) rather than indirect intervention through disclosure. The sum effect of these other mechanisms is to impose controls over the crucial aspects of the petroleum marketing business, such as termination and non-renewal of dealerships, allocation of supplies and price of product. Under this circumstance, the disclosures required by the franchise rule become unnecessary in view of the substantive regulation of this particular industry.

While the foregoing mechanisms may not operate perfectly to eliminate all abuses, the record does support the conclusion that the potential for abuse has been sufficiently reduced by the PMPA and DOE regulations as to render coverage by the franchise rule, as drafted, largely duplicative of other federal regulations. The Commission concludes, therefore, that the standard pre-

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[2] *E.g.*, Comments of California Service Station Association, Record at 18; Idaho Service Station Association, Record at 57; Service Station Association of Louisiana, Inc., Record at 59; Virginia Gasoline Retailers Association, Inc., Record at 61; Service Station Dealers of America, Inc., Record at 83. [All citations to the Exemption Record appear in volume 215-34-1-15-1.]

scribed by Section 18(g) for exemption is met because application of the rule is "not necessary to prevent the unfair or deceptive act or practice to which the rule relates." However, if circumstances change in the future and evidence of renewed misrepresentations in the sale of petroleum franchises reappears on a significant scale, a new rulemaking proceeding may be undertaken that is tailored to the specific needs of the industry. In the interim, if isolated abuses occur, they will be subject to the adjudicative procedures and remedies provided by Section 5 of the FTC Act.

Since the record reflects that the PMPA is primarily responsible for addressing the past practices the franchise rule was designed to prevent, the Commission concludes that an exemption is warranted for those relationships subject to the PMPA's provisions. Consequently, the Commission has determined that the provisions of Part 436 shall not apply to the advertising, offering, licensing, contracting, sale or other promotion of a "franchise," as the term "franchise" is defined by the PMPA, by all of the petitioners. Furthermore, the Commission finds no principled basis to distinguish the same activities when performed by non-petitioners from those performed by petitioners; accordingly, the advertising, offering, licensing, contracting, sale or other promotion of a "franchise," as the term "franchise" is defined by the PMPA, by any non-petitioner also shall be exempt from the rule's coverage.

IT IS SO ORDERED.

By The Commission.

/s/ Carol Thomas
CAROL THOMAS
Secretary

SEAL

Issued: July 17, 1980

APPENDIX C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

[Materials Explaining Procedure For Filing Rehearing Petition Omitted]

[Entered on November 6, 1980]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 78-3680, et al.

IN RE FTC FRANCHISE DISCLOSURE RULE REVIEW

ORDER

Before: KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Ferguson voted to reject the suggestion for rehearing en banc and Judge Williams made no recommendation concerning the en banc request.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[Entered on February 9, 1981]

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* Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.

APPENDIX E

A.

Federal Trade Commission Act

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15 U.S.C. § 57a (1976 & Supp. III 1979) provides:

Unfair or deceptive acts or practices rulemaking proceedings—Authority of Commission to prescribe rules and general statements of policy

(a)(1) Except as provided in subsection (i) of this section, the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this chapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the

Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

Procedure applicable

(b) (1) When prescribing a rule under subsection (a) (1) (B) of this section, the Commission shall proceed in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e) (1) (B) of this section), together with a statement of basis and purpose.

(2) (A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1) (A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).

(C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives.

Informal hearing procedure

(c) The Commission shall conduct any informal hearings required by subsections (b)(1)(C) of this section in accordance with the following procedure:

(1)(A) The Commission shall provide for the conduct of proceedings under this subsection by hearing officers who shall perform their functions in accordance with the requirements of this subsection.

(B) The officer who presides over the rulemaking proceedings shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(C) Except as required for the disposition of ex parte matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(2) Subject to paragraph (3) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submissions (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (3)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(3) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (2) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

(4)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (2) and (3) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or

similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(5) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

Statement of basis and purpose accompanying rule; "Commission" defined; judicial review of amendment or repeal of rule; violation of rules

(d) (1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a) (1) (B) of this section shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of

the rule, taking into account the effect on small business and consumers.

(2) (A) The term "Commission" as used in this subsection and subsections (b) and (c) of this section includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a) (1) (B) of this section shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) of this section shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a) (1) (B) of this section takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a) (1) of this title, unless the Commission otherwise expressly provides in such rule.

Judicial review: petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(e) (1) (A) Not later than 60 days after a rule is promulgated under subsection (a) (1) (B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principle place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(B) For the purposes of this section, the term "rule-making record" means the rule, its statement of basis and purpose, the transcript required by subsection (c) (5) of this section, any written submission, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission's action is not supported by substantial evidence in the rule-making record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term "evidence", as used in this paragraph, means any matter in the rulemaking record.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) (A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Court of Appeals shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a) (1) (B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3) (B) (i) or (ii) may be

reviewed only in a proceeding under this subsection and only in accordance with paragraph (3) (B). Section 706 (2) (E) of Title 5 shall not apply to any rule promulgated under subsection (a) (1) (B) of this section. The contents and adequacy of any statement required by subsection (b) (1) (D) of this section shall not be subject to judicial review in any respect.

* * * *

Exemptions and stays from applications of rules; procedures

(g) (1) Any person to whom a rule under subsection (a) (1) (B) of this section applies may petition the Commission for an exemption from such rule.

(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a) (1) (B) of this section to any person or class of persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of Title 5 shall apply to action under this paragraph.

(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a) (1) (B) of this section.

Compensation for attorney fees, expert witness fees, etc., incurred by persons in rulemaking proceedings; limitation on amount; establishment of small business outreach program

(h) (1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable at-

torneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

(3) The amount of compensation which may be paid to any person under this subsection in connection with the participation by such person in any particular rulemaking proceeding under this section may not exceed $75,000. The aggregate amount of compensation paid under this subsection in any fiscal years to any person for all rulemaking proceedings in which such person participates during such fiscal year may not exceed $50,000.

(4) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $750,000.

(5) The Commission, in connection with the administration of this subsection pursuant to rule prescribed by

the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.

Restriction on rulemaking authority of Commission respecting children's advertising proceedings pending on May 28, 1980

(i) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.

Meetings with outside parties

(j) (1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after May 28, 1980, the Commission shall publish a proposed rule, and not later than 180 days after May 28, 1980, the Commission shall promulgate a final rule, which shall authorize the Com-

mission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, shall be kept, made available to the public and included in the rulemaking record.

Communications by investigative personnel with staff of Commission concerning matters outside rulemaking record prohibited

(k) Not later than 60 days after May 28, 1980, the Commission shall publish a proposed rule, and not later than 180 days after May 28, 1980, the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

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B.

Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures

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16 C.F.R. Part 436 (1980) provides:

§ 436.1 The Rule.

In connection with the advertising, offering, licensing, contracting, sale, or other promotion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for any franchisor or franchise broker:

(a) To fail to furnish any prospective purchasee with the following information accurately, clearly, and concisely stated, in a legible, written document at the earlier of the "time for making of disclosures" or the first "personal meeting":

(1) (i) The official name and address and principal place of business of the franchisor, and of the parent firm or holding company of the franchisor, if any;

(ii) The name under which the franchisor is doing or intends to do business; and

(iii) The trademarks, trade names, service marks, advertising or other commercial symbols (hereinafter collectively referred to as "marks") which identify the goods, commodities, or services to be offered, sold, or distributed by the prospective franchisee, or under which the prospective franchisee will be operating.

(2) The business experience during the past 5 years, stated individually, of each of the franchisor's current

directors and executive officers (including, and hereinafter to include, the chief executive and chief operating officer, financial, franchise marketing, training and service officers). With regard to each person listed, those persons' principal occupations and employers must be included.

(3) The business experience of the franchisor and the franchisor's parent firm (if any), including the length of time each: (i) has conducted a business of the type to be operated by the franchisee; (ii) has offered or sold a franchise for such business; (iii) has conducted a business or offered or sold a franchise for a business (A) operating under a name using any mark set forth under paragraph (a) (1) (iii), or (B) involving the sale, offering, or distribution of goods, commodities, or services which are identified by any mark set forth under paragraph (a) (1) (iii); and (iv) has offered for sale or sold franchises in other lines of business, together with a description of such other lines of business.

(4) A statement disclosing who, if any, of the persons listed in paragraphs (a) (2) and (a) (3) of this section:

(i) Has, at any time during the previous seven fiscal years, been convicted of a felony or pleaded nolo contendere to a felony charge if the felony involved fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade;

(ii) Has, at any time during the previous seven fiscal years, been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action (A) involving allegations of fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint

of trade, or (B) which was brought by a present or former franchisee or franchisees and which involves or involved the franchise relationship; *Provided, however,* That only material individual civil actions need be so listed pursuant to this subparagraph (4)(ii), including any group of civil actions which, irrespective of the materiality of any single such action, in the aggregate is material;

(iii) Is subject to any currently effective State or Federal agency or court injunctive or restrictive order, or is a party to a proceeding currently pending in which such order is sought, relating to or affecting franchise activities or the franchisor-franchisee relationship, or involving fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade.

Such statment shall set forth the identity and location of the court or agency; the date of conviction, judgment, or decision; the penalty imposed; the damages assessed; the terms of settlement or the terms of the order; and the date, nature, and issuer of each such order or ruling. A franchisor may include a summary opinion of counsel as to any pending litigation, but only if counsel's consent to the use of such opinion is included in the disclosure statement.

(5) A statement disclosing who, if any, of the persons listed in paragraphs (a)(2) and (a)(3) of this section at any time during the previous 7 fiscal years has:

(i) Filed in bankruptcy;

(ii) Been adjudged bankrupt;

(iii) Been reorganized due to insolvency; or

(iv) Been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized, during or within 1 year after the period that such person held such position in such other person. If so, the name and location of the person having so filed, or having been so adjudged or reorganized, the date thereof, and any other material facts relating thereto, shall be set forth.

(6) A factual description of the franchise offered to be sold by the franchisor.

(7) A statement of the total funds which must be paid by the franchisee to the franchisor or to a person affiliated with the franchisor, or which the franchisor or such affiliated person imposes or collects in whole or in part on behalf of a third party, in order to obtain or commence the franchise operation, such as initial franchise fees, deposits, downpayments, prepaid rent, and equipment and inventory purchases. If all or part of these fees or deposits are returnable under certain conditions, these conditions shall be set forth; and if not returnable, such fact shall be disclosed.

(8) A statement describing any recurring funds required to be paid, in connection with carrying on the franchise business, by the franchisee to the franchisor or to a person affiliated with the franchisor, or which the franchisor or such affiliated person imposes or collects in whole or in part on behalf of a third party, including, but not limited to, royalty, lease, advertising, training, and sign rental fees, and equipment or inventory purchases.

(9) A statement setting forth the name of each person (including the franchisor) the franchisee is directly or indirectly required or advised to do business with by the franchisor, where such persons are affiliated with the franchisor.

(10) A statement describing any real estate, services, supplies, products, inventories, signs, fixtures, or equipment relating to the establishment or the operation of the franchise business which the franchisee is directly or indirectly required by the franchisor to purchase, lease or rent; and if such purchases, leases or rentals must be made from specific persons (including the franchisor), a list of the names and addresses of each such person. Such list may be made in a separate document delivered to the prospective franchisee with the prospectus if the existence of such separate document is disclosed in the prospectus.

(11) A description of the basis for calculating, and, if such information is readily available, the actual amount of, any revenue or other consideration to be received by the franchisor or persons affiliated with the franchisor from suppliers to the prospective franchisee in consideration for goods or services which the franchisor requires or advises the franchisee to obtain from such suppliers.

(12) (i) A statement of all the material terms and conditions of any financing arrangement offered directly or indirectly by the franchisor, or any person affiliated with the franchisor, to the prospective franchisee; and

(ii) A description of the terms by which any payment is to be received by the franchisor from (A) any person offering financing to a prospective franchisee; and (B) any person arranging for financing for a prospective franchisee.

(13) A statement describing the material facts of whether, by the terms of the franchise agreement or other device or practice, the franchisee is:

(i) Limited in the goods or services he or she may offer for sale;

(ii) Limited in the customers to whom he or she may sell such goods or services;

(iii) Limited in the geographic area in which he or she may offer for sale or sell goods or services; or

(iv) Granted territorial protection by the franchisor, by which, with respect to a territory or area, (A) the franchisor will not establish another, more than any fixed number of, franchises or company-owned outlets, either operating under, or selling, offering, or distributing goods, commodities or services, identified by any mark set forth under paragraph (a) (1) (iii) of this section; or (B) the franchisor or its parent will not establish other franchises or company-owned outlets selling or leasing the same or similar products or services under a different trade name, trademark, service mark, advertising or other commercial symbol.

(14) A statement of the extent to which the franchisor requires the franchisee (or, if the franchisee is a corporation, any person affiliated with the franchisee) to participate personally in the direct operation of the franchise.

(15) A statement disclosing, with respect to the franchise agreement and any related agreements:

(i) The term (i.e., duration of arrangement), if any, of such agreement, and whether such term is or may be affected by any agreement (including leases or subleases) other than the one from which such term arises;

(ii) The conditions under which the franchisee may review or extend;

(iii) The conditions under which the franchisor may refuse to renew or extend;

(iv) The conditions under which the franchisee may terminate;

(v) The conditions under which the franchisor may terminate;

(vi) The obligations (including lease or sublease obligations) of the franchisee after termination of the franchise by the franchisor, and the obligations of the franchisee (including lease or sublease obligations) after termination of the franchise by the franchisee and after the expiration of the franchise;

(vii) The franchisee's interest upon termination of the franchise, or upon refusal to renew or extend the franchise, whether by the franchisor or by the franchisee;

(viii) The conditions under which the franchisor may repurchase, whether by right of first refusal or at the option of the franchisor (and if the franchisor has the option to repurchase the franchise, whether there will be an independent appraisal of the franchise, whether the repurchase price will be determined by a predetermined formula and whether there will be a recognition of goodwill or other intangibles associated therewith in the repurchase price to be given the franchisee);

(ix) The conditions under which the franchisee may sell or assign all or any interest in the ownership of the franchise, or of the assets of the franchise business;

(x) The conditions under which the franchisor may sell or assign, in whole or in part, its interest under such agreements;

(xi) The conditions under which the franchisee may modify;

(xii) The conditions under which the franchisor may modify;

(xiii) The rights of the franchisee's heirs or personal representative upon the death or incapacity of the franchisee; and

(xiv) The provisions of any covenant not to compete.

(16) A statement disclosing, with respect to the franchisor and as to the particular named business being offered:

(i) The total number of franchises operating at the end of the preceding fiscal year;

(ii) The total number of company-owned outlets operating at the end of the preceeding fiscal year;

(iii) The names, addresses, and telephone numbers of (A) The 10 franchised outlets of the named franchise business nearest the prospective franchisee's intended location; or (B) all franchisees of the franchisor, or (C) all franchisees of the franchisor in the State in which the prospective franchisee lives or where the proposed franchise is to be located, *Provided, however,* That there are more than 10 such franchises. If the number of franchisees to be disclosed pursuant to paragraph (a) (16) (iii) (B) or (C) of this section exceeds 50, such listing may be made in a separate document delivered to the prospective franchisee with the prospectus if the existence of such separate document is disclosed in the prospectus;

(iv) The number of franchises voluntarily terminated or not renewed by franchises within, or at the conclusion of, the term of the franchise agreement, during the preceding fiscal year;

(v) The number of franchises reacquired by purchase by the franchisor during the term of the franchise agreement, and upon the conclusion of the term of the franchise agreement, during the preceding fiscal year;

(vi) The number of franchises otherwise reacquired by the franchisor during the term of the franchise agreement, and upon the conclusion of the term of the franchise agreement, during the preceding fiscal year;

(vii) The number of franchises for which the franchisor refused renewal of the franchise agreement or other agreements relating to the franchise during the preceding fiscal year; and

(viii) The number of franchises that were canceled or terminated by the franchisor during the term of the franchise agreement, and upon conclusion of the term of the franchise agreement, during the preceding fiscal year.

With respect to the disclosures required by paragraphs (a)(16)(v), (vi), (vii), and (viii) of this section, the disclosure statement shall also include a general categorization of the reasons for such reacquisitions, refusals to renew or terminations, and the number falling within each such category, including but not limited to the following: failure to comply with quality control standards, failure to make sufficient sales, and other breaches of contract.

(17)(i) If site selection or approval thereof by the franchisor is involved in the franchise relationship, a statement disclosing the range of time that has elapsed between signing of franchise agreements or other agreements relating to the franchise and site selection, for agreements entered into during the preceding fiscal year;

(ii) If operating franchise outlets are to be provided by the franchisor, a statement disclosing the range of time that has elapsed between the signing of franchise agreements or other agreements relating to the franchise and the commencement of the franchisee's business, for agreements entered into during the preceding fiscal year.

With respect to the disclosures required by paragraphs (a)(17)(i) and (ii) of this section, a franchisor may at its option also provide a distribution chart using

meaningful classifications with respect to such ranges of time.

(18) If the franchisor offers an initial training program or informs the prospective franchisee that it intends to provide such person with initial training, a statement disclosing:

(i) The type and nature of such training;

(ii) The minimum amount, if any, of training that will be provided to a franchisee; and

(iii) The cost, if any, to be borne by the franchisee for the training to be provided, or for obtaining such training.

(19) If the name of a public figure is used in connection with a recommendation to purchase a franchise, or as a part of the name of the franchise operation, or if the public figure is stated to be involved with the management of the franchisor, a statement disclosing:

(i) The nature and extent of the public figure's involvement and obligations to the franchisor, including but not limited to the promotional assistance the public figure will provide to the franchisor and to the franchisee;

(ii) The total investment of the public figure in the franchise operation; and

(iii) The amount of any fee or fees the franchisee will be obligated to pay for such involvement or assistance provided by the public figure.

(20) (i) A balance sheet (statement of financial position) for the franchisor for the most recent fiscal year, and an income statement (statement of results of operations) and statement of changes in financial position for the franchisor for the most recent 3 fiscal years.

Such statements are required to have been examined in accordance with generally accepted auditing standards by an independent certified or licensed public accountant. *Provided, however,* That where a franchisor is a subsidiary of another corporation which is permitted under generally accepted accounting principles to prepare financial statements on a consolidated or combined statement basis, the above information may be submitted for the parent if (A) the corresponding unaudited financial statements of the franchisor are also provided, and (B) the parent absolutely and irrevocably has agreed to guarantee all obligations of the subsidiary;

(ii) Unaudited statements shall be used only to the extent that audited statements have not been made, and provided that such statements are accompanied by a clear and conspicious disclosure that they are unaudited. Statements shall be prepared on an audited basis as soon as practicable, but, at a minimum, financial statements for the first full fiscal year following the date on which the franchisor must first comply with this part shall contain a balance sheet opinion prepared by an independent certified or licensed public accountant, and financial statements for the following fiscal year shall be fully audited.

(21) All of the foregoing information in paragraph (a)(1) through (20) of this section shall be contained in a single disclosure statement or prospectus, which shall not contain any materials or information other than that required by this part or by State law not preempted by this part. This does not preclude franchisors or franchise brokers from giving other nondeceptive information orally, visually, or in separate literature so long as such information is not contradictory to the information in the disclosure statement required by paragraph (a) of this section. This disclosure statement shall carry a cover sheet distinctively and conspicuously

showing the name of the franchisor, the date of issuance of the disclosure statement, and the following notice imprinted thereon in upper and lower case bold-face type of not less than 12 point size:

Information for Prospective Franchises Required by Federal Trade Commission

* * * * *

To protect you, we've required your franchisor to give you this information. *We haven't checked it, and don't know if it's correct.* It should help you make up your mind. Study it carefully. While it includes some information about your contract, don't rely on it alone to understand your contract. Read all of your contract carefully. Buying a franchise is a complicated investment Take your time to decide. If possible, show your contract and this information to an advisor, like a lawyer or an accountant. If you find anything you think may be wrong or anything important that's been left out, you should let us know about it. It may be against the law.

There may also be laws on franchising in your state. Ask your state agencies about them.

FEDERAL TRADE COMMISSION,
Washington, D.C.

Provided, That the obligation to furnish such disclosure statement shall be deemed to have been met for both the franchisor and the franchise broker if either such party furnishes the prospective franchisee with such disclosure statement.

(22) All information contained in the disclosure statement shall be current as of the close of the franchisor's most recent fiscal year. After the close of each fiscal year, the franchisor shall be given a period not exceeding 90 days to prepare a revised disclosure statement and, following such 90 days, may distribute only the revised

prospectus and no other. The franchisor shall, within a reasonable time after the close of each quarter of the fiscal year, prepare revisions to be attached to the disclosure statement to reflect any material change in the franchisor or relating to the franchise business of the franchisor, about which the franchisor or franchise broker, or any agent, representative, or employee thereof, knows or should know. Each prospective franchisee shall have in his or her possession, at the "time for making of disclosures," the disclosure statement and quarterly revision for the period most recent to the "time for making of disclosures" and available at that time. Information which is required to be audited pursuant to paragraph (a) (20) of this section is not required to be audited for quarterly revisions, *Provided, however,* That the unaudited information be accompanied by a statement in immediate conjunction therewith that clearly and conspicuously discloses that such information has not been audited.

(23) A table of contents shall be included within the disclosure statement.

(24) The disclosure statement shall include a comment which either positively or negatively responds to each disclosure item required to be in the disclosure statement, by use of a statement which fully incorporates the information required by the item. Each disclosure item therein must be preceded by the appropriate heading, as set forth in Note 3 of this part.

(b) To make any oral, written, or visual representation to a prospective franchisee which states a specific level of potential sales, income, gross or net profit for that prospective franchisee, or which states other facts which suggest such a specific level, unless:

(1) At the time such representation is made, such representation is relevant to the geographic market in which the franchise is to be located;

(2) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation, and such material is made available to any prospective franchisee and to the Commission or its staff upon reasonable demand. *Provided, further,* That in immediate conjunction with such representation, the franchisor shall disclose in a clear and conspicuous manner that such material is available to the prospective franchisee; and *Provided, however,* That no provision within paragraph (b) of this section shall be construed as requiring the disclosure to any prospective franchisee of the identity of any specific franchisee or of information reasonably likely to lead to the disclosure of such person's identity; and *Provided, further,* That no additional representation as to a prospective franchisee's potential sales, income, or profits may be made later than the "time for making of disclosures";

(3) Such representation is set forth in detail along with the material bases and assumptions therefor in a single legible written document whose text accurately, clearly and concisely discloses such information, and none other than that provided for by this part or by State law not preempted by this part. Each prospective franchisee to whom the representation is made shall be furnished with such document no later than the "time for making of disclosures"; *Provided, however,* That if the representation is made at or prior to a "personal meeting" and such meeting occurs before the "time for making of disclosures", the document shall be furnished to the prospective franchisee to whom the representation is made at that "personal meeting";

(4) The following statement is clearly and conspicuously disclosed in the document described by paragraph (b)(3) of this section in immediate conjunction with such representation and in not less than twelve point upper and lower-case boldface type:

Caution

These figures are only estimates of what we think you may earn. There is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(5) The following information is clearly and conspicuously disclosed in the document described by paragraph (b)(3) of this section in immediate conjunction with such representation:

(i) The number and percentage of outlets of the named franchise business which are located in the geographic markets that form the basis for any such representation and which are known to the franchisor or franchise broker to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those potential sales, income, or profits represented; and

(ii) The beginning and ending dates for the corresponding time period referred to by paragraph (b)(5)(i) of this section, *Provided, however,* That any franchisor without prior franchising experience as to the named franchise business so indicate such lack of experience in the document described in paragraph (b)(3) of this section.

Except, That representations of the sales, income or profits of existing franchise outlets need not comply with this paragraph (b).

(c) To make any oral, written or visual representation to a prospective franchisee which states a specific level

of sales, income, gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business, or which states other facts which suggests such a specific level, unless:

(1) At the time such representation is made, such representation is relevant to the geographic market in which the franchise is to be located;

(2) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation, and such material is made available to any prospective franchisee and to the Commission or its staff upon reasonable demand, *Provided, however,* That in immediate conjunction with such representation, the franchisor discloses in a clear and conspicuous manner that such material is available to the prospective franchisee; and *Provided, further,* That no provision within paragraph (c) of this section shall be construed as requiring the disclosure to any prospective franchisee of the identity of any specific franchisee or of information reasonably likely to lead to the disclosure of such person's identity; and *Provided, further,* That no additional representation as to the sales, income, or gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business may be made later than the "time for making of disclosures";

(3) Such representation is set forth in detail along with the material bases and assumptions therefor in a single legible written document which accurately, clearly and concisely discloses such information, and none other than that provided for by this part or by State law not preempted by this part. Each prospective franchisee to whom the representation is made shall be furnished with such document no later than the "time for making of disclosures", *Provided, however,* That if the representa-

tion is made at or prior to a "personal meeting" and such meeting occurs before the "time for making of disclosures," the document shall be furnished to the prospective franchisee to whom the representation is made at that "personal meeting";

(4) The underlying data on which the representation is based have been prepared in accordance with generally accepted accounting principles;

(5) The following statement is clearly and conspicuously disclosed in the document described by paragraph (c) (3) of this section in immediate conjunction with such representation, and in not less than twelve point upper and lower case boldface type:

CAUTION

Some outlets have [sold] [earned] this amount. There is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(6) The following information is clearly and conspicuously disclosed in the document described by paragraph (c) (3) of this section in immediate conjunction with such representation:

(i) The number and percentage of outlets of the named franchise business which are located in the geographic markets that form the basis for any such representation and which are known to the franchisor or franchise broker to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented; and

(ii) The beginning and ending dates for the corresponding time period referred to by subparagraph (6) (i), *Provided, however,* That any franchisor without prior franchising experience as to the named franchise business

so indicate such lack of experience in the document described in paragraph (c)(3) of this section.

(d) To fail to provide the following information within the document(s) required by paragraphs (b)(3) and (c)(3) of this section whenever any representation is made to a prospective franchisee regarding its potential sales, income, or profits, or the sales, income, gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business:

(1) A cover sheet distinctively and conspicuously showing the name of the franchisor, the date of issuance of the document and the following notice imprinted thereon in upper and lower case boldface type of not less than twelve point size:

INFORMATION FOR PROSPECTIVE FRANCHISEES ABOUT FRANCHISE [SALES] [INCOME] [PROFIT] REQUIRED BY THE FEDERAL TRADE COMMISSION.

To protect you, we've required the franchisor to give you this information. *We haven't checked it and don't know if it's correct.* Study these facts and figures carefully. If possible, show them to someone who can advise you, like a lawyer or an accountant. Then take your time and think it over.

If you find anything you think may be wrong or anything important that's been left out, let us know about it. It may be against the law.

There may also be laws on franchising in your State. Ask your State agencies about them.

FEDERAL TRADE COMMISSION,
Washington, D.C.

(2) A table of contents.

Provided, however, That each prospective franchisee to whom the representation is made shall be notified at the "time for making of disclosures" of any material change (about which the franchisor, franchise broker, or any of the agents, representatives, or employees thereof, knows or should know) in the information contained in the document(s) described by paragraph (b)(3) and (c)(3) of this section.

(e) To make any oral, written, or visual representation for general dissemination (not otherwise covered by paragraphs (b) or (c) of this section) which states a specific level of sales, income, gross or net profits, either actual or potential, of existing or prospective outlets (whether franchised or company-owned) of the named franchise business or which states other facts which suggest such a specific level, unless:

(1) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation and which is made available to the Commission or its staff upon reasonable demand;

(2) The underlying data on which each representation of sales, income or profit for existing outlets is based have been prepared in accordance with generally accepted accounting principles;

(3) In immediate conjunction with such representation, there shall be clearly and conspicuously disclosed the number and percentage of outlets of the named franchise business which the franchisor or the franchise broker knows to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented, and the beginning and ending dates for said time period;

(4) In immediate conjunction with each such representation of potential sales, income or profits, the following statement shall be clearly and conspicuously disclosed:

CAUTION

These figures are only estimates; there is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

Provided, however, That if such representation is not based on actual experience of existing outlets of the named franchise business, that fact also should be disclosed;

(5) No later than the earlier of the first "personal meeting" or the "time for making of disclosures," each prospective franchisee shall be given a single, legible written document which accurately, clearly and concisely sets forth the following information and materials (and none other than that provided for by this part or by State law not preempted by this part):

(i) The representation, set forth in detail along with the material bases and assumptions therefor;

(ii) The number and percentage of outlets of the named franchise business which the franchisor or the franchise broker knows to have earned or made at least the same sales, income or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented, and the beginning and ending dates for said time period;

(iii) With respect to each such representation of sales, income, or profits of existing outlets, the following statement shall be clearly and conspicuously disclosed in immediate conjunction therewith, printed in not less than 12 point upper and lower case boldface type:

CAUTION

Some outlets have [sold] [earned] this amount. There is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(iv) With respect to each such representation of potential sales, income, or profits, the following statement shall be clearly and conspicuously disclosed in immediate conjunction therewith, printed in not less than 12 point upper and lower case boldface type:

CAUTION

These figures are only estimates. There is no assurance that you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(v) If applicable, a statement clearly and conspicuously disclosing that the franchisor lacks prior franchising experience as to the named franchise business;

(vi) If applicable, a statement clearly and conspicuously disclosing that the franchisor has not been in business long enough to have actual business data;

(vii) A cover sheet, distinctively and conspicuously showing the name of the franchisor, the date of issuance of the document, and the following notice printed thereon in not less than 12 point upper and lower case boldface type:

INFORMATION FOR PROSPECTIVE FRANCHISEES ABOUT FRANCHISE [SALES] [INCOME] [PROFIT] REQUIRED BY THE FEDERAL TRADE COMMISSION

To protect you, we've required the franchisor to give you this information. *We haven't checked it and don't know if it's correct.* Study these facts and figures carefully. If possible, show them to someone who can advise you, like a lawyer or an accountant. If you find any-

thing you think may be wrong, or anything important that's been left out, let us know about it. It may be against the law. There may also be laws about franchising in your State. Ask your State agencies about them.

FEDERAL TRADE COMMISSION,
Washington, D.C.

(viii) A table of contents;

(6) Each prospective franchisee shall be notified at the "time for making of disclosures" of any material changes that have occurred in the information contained in this document.

(f) To make any claim or representation which is contradictory to the information required to be disclosed by this part.

(g) To fail to furnish the prospective franchisee with a copy of the franchisor's franchise agreement and related agreements with the documents, and a copy of the completed franchise and related agreements intended to be executed by the parties at last 5 businss days prior to the date the agreements are to be executed.

Provided, however, That the obligations defined in paragraphs (b) through (g) of this section shall be deemed to have been met for both the franchisor and the franchise broker if either such person furnishes the prospective franchisee with the written disclosures required thereby.

(h) To fail to return any funds or deposits in accordance with any conditions disclosed pursuant to paragraph (a) (7) of this section.

§ 436.2 Definitions.

As used in this part, the following definitions shall apply:

(a) The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1) (i) (A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" as hereinafter defined), goods, commodities, or services which are:

(*1*) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

(*2*) Indirectly or directly required or advised to meet the quality standards prescribed by another person (hereinafter "franchisor") where the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

(B) (*1*) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

(*2*) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; *Provided, however,* That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

(ii) (A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(*1*) Supplied by another person (hereinafter "franchisor"), or

(*2*) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly required to do business by another person (hereinafter "franchisor"); or

(*3*) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

(B) The franchisor:

(*1*) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

(*2*) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

(*3*) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraph (a) (1) (ii) (B) (*1*) and (*2*) above; and

(2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

(3) Exemptions. The provisions of this part shall not apply to a franchise:

(i) Which is a "fractional franchise"; or

(ii) Where pursuant to a lease, license, or similar agreement, a person offers, sells, or distributes goods, commodities, or services on or about premises occupied by a retailer-grantor primarily for the retailer-grantor's own merchandising activities, which goods, commodities, or services are not purchased from the retailer-grantor

or persons whom the lessee is directly or indirectly (A) required to do business with by the retailer-grantor or (B) advised to do business with by the retailer-grantor where such person is affiliated with the retailer-grantor; or

(iii) Where the total of the payments referred to in paragraph (a) (2) of this section made during a period from any time before to within 6 months after commencing operation of the franchisee's business, is less than $500; or

(iv) Where there is no writing which evidences any material term or aspect of the relationship or arrangement.

(4) Exclusions. The term "franchise" shall not be deemed to include any continuing commercial relationship created solely by:

(i) The relationship between an employer and an employee, or among general business partners; or

(ii) Membership in a bona fide "co-operative association"; or

(iii) An agreement for the use of a trademark, service mark, trade name, seal, advertising, or other commercial symbol designating a person who offers on a general basis, for a fee or otherwise, a bona fide service for the evaluation, testing, or certification of goods, commodities, or services;

(iv) An agreement between a licensor and a single licensee to license a trademark, trade name, service mark, advertising or other commercial symbol where such license is the only one of its general nature and type to be granted by the licensor with respect to that trademark, trade name, service mark, advertising, or other commercial symbol.

(5) Any relationship which is represented either orally or in writing to be a franchise (as defined in this paragraph (a) (1) and (2) of this section) is subject to the requirements of this part.

(b) The term "person" means any individual, group, association, limited or general partnership, corporation, or any other business entity.

(c) The term "franchisor" means any person who participates in a franchise relationship as a franchisor, as denoted in paragraph (a) of this section.

(d) The term "franchisee" means any person (1) who participates in a franchise relationship as a franchisee, as denoted in paragraph (a) of this section, or (2) to whom an interest in a franchise is sold.

(e) The term "prospective franchisee" includes any person, including any representative, agent, or employee of that person, who approaches or is approached by a franchisor or franchise broker, or any representative, agent, or employee thereof, for the purpose of discussing the establishment, or possible establishment, of a franchise relationship involving such a person.

(f) The term "business day" means any day other than Saturday, Sunday, or the following national holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, and Christmas.

(g) The term "time for making of disclosures" means ten (10) business days prior to the earlier of (1) the execution by a prospective franchisee of any franchise agreement or any other agreement imposing a binding legal obligation on such prospective franchisee, about which the franchisor, franchise broker, or any agent, representative, or employee thereof, knows or should know, in connection with the sale or proposed sale of a franchise, or (2) the payment by a prospective fran-

chisee, about which the franchisor, franchise broker, or any agent, representative, or employee thereof, knows or should know, of any consideration in connection with the sale or proposed sale of a franchise.

(h) The term "fractional franchise" means any relationship, as denoted by paragraph (a) of this section, in which the person described therein as a franchisee, or any of the current directors or executive officers thereof, has been in the type of business represented by the franchise relationship for more than 2 years and the parties anticipated, or should have anticipated, at the time the agreement establishing the franchise relationship was reached, that the sales arising from the relationship would represent no more than 20 percent of the sales in dollar volume of the franchisee.

(i) The term "affiliated person" means a person (as defined in paragraph (b) of this section):

(1) Which directly or indirectly controls, is controlled by, or is under common control with, a franchisor; or

(2) Which directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a franchisor; or

(3) Which has, in common with a franchisor, one or more partners, officers, directors, trustees, branch managers, or other persons occupying similar status or performing similar functions.

(j) The term "franchise broker" means any person other than a franchisor or a franchisee who sells, offers for sale, or arranges for the sale of a franchise.

(k) The term "sale of a franchise" includes a contract or agreement whereby a person obtains a franchise or interest in a franchise for value by purchase, license, or otherwise. This term shall not be deemed to include the renewal or extension of an existing franchise where

there is no interruption in the operation of the franchsed business by the franchisee, unless the new contracts or agreements contain material changes from those in effect between the franchisor and franchisee prior thereto.

(l) A "cooperative association" is either (1) an association of producers of agricultural products authorized by section 1 of the Capper-Volstead Act, 7 U.S.C. 291; or (2) an organization operated on a cooperative basis by and for independent retailers which wholesales goods or furnishes services primarily to its member-retailers.

(m) The term "fiscal year" means the franchisor's fiscal year.

(n) The terms "material," "material fact," and "material change" shall include any fact, circumstance, or set of conditions which has a substantial likelihood of influencing a reasonable franchisee or a reasonable prospective franchisee in the making of a significant decision relating to a named franchise business or which has any significant financial impact on a franchisee or prospective franchisee.

(o) The term "personal meeting" means a face-to-face meeting between a franchisor or franchise broker (or any agent, representative, or employee thereof) and a prospective franchisee which is held for the purpose of discussing the sale or possible sale of a franchise.

§ 436.3 Severability.

If any provision of this part or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice shall not be affected thereby.

NOTE 1.—The Commission expresses no opinion as to the legality of any practice mentioned in this part. A provision for disclosure should not be construed as con-

donation or approval with respect to the matter required to be disclosed, nor as an indication of the Commission's intention not to enforce any applicable statute.

NOTE 2.—By taking action in this area, the Federal Trade Commission does not intend to annul, alter, or affect, or exempt any person subject to the provisions of this part from complying with the laws or regulations of any State, municipality, or other local government with respect to franchising practices, except to the extent that those laws or regulations are inconsistent with any provision of this part, and then only to the extent of the inconsistency. For the purposes of this part, a law or regulation of any State, municipality, or other local government is not inconsistent with this part if the protection such law or regulation affords any prospective franchisee is equal to or greater than that provided by this part. Examples of provisions which provide protection equal to or greater than that provided by this part include laws or regulations which require more complete record keeping by the franchisor or the disclosure of more complete information to the franchisee.

NOTE 3.—[As per § 436.1(a)(24) of this part]:

DISCLOSURE STATEMENT

Pursuant to 16 CFR 436.1 et seq., a Trade Regulation Rule of the Federal Trade Commission regarding Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, the following information is set forth on [name of franchisor] for your examination:

1. Identifying information as to franchisor.

2. Business experience of franchisor's directors and executive officers.

3. Business experience of the franchisor.

4. Litigation history.

5. Bankruptcy history.

6. Description of franchise.

7. Initial funds required to be paid by a franchisee.

8. Recurring funds required to be paid by a franchisee.

9. Affiliated persons the franchisee is required or advised to do business with by the franchisor.

10. Obligations to purchase.

11. Revenues received by the franchisor in consideration of purchases by a franchisee.

12. Financing arrangements.

13. Restriction of sales.

14. Personal participation required of the franchisee in the operation of the franchise.

15. Termination, cancellation, and renewal of the franchise.

16. Statistical information concerning the number of franchises (and company-owned outlets).

17. Site selection.

18. Training programs.

19. Public figure involvement in the franchise.

20. Financial information concerning the franchisor.

CORRECTED COPY Corrections on page 5.

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No. 80-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

SUPPLEMENTAL MEMORANDUM FOR EXXON CORPORATION REGARDING A NEW DECISION WHICH SHARPLY DIVIDES THE CIRCUIT COURTS AND REPLYING TO FEDERAL TRADE COMMISSION'S SUPPLEMENTAL MEMORANDUM

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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A sharp conflict in the circuit courts has been created by a recent decision by the Tenth Circuit in *Mono-Therm Industries, Inc.* v. *FTC*, No. 80-2113 (10th Cir. July 14, 1981),[1] which came to Petitioner's attention subsequent to the filing of its last brief.[2] The Tenth Circuit

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[1] This decision is reproduced in a separate appendix.

[2] The government's decision to remain silent on *Mono-Therm*, which was available to it 20 days before it filed its Supplemental Memorandum, should be considered in connection with any effort by the government to file additional briefs on this matter.

has now adopted a position on standing and mootness as to appeals from Federal Trade Commission ("FTC") rules which cannot be reconciled with the Ninth Circuit's decision here. In *Mono-Therm*, the Tenth Circuit adopted a liberal interpretation of standing and mootness in direct appeals from FTC trade regulation rules, along with a strict cut-off on all appeals outside the statutory sixty-day time limit applicable to such rules. By contrast, the Ninth Circuit here adopted a rigid interpretation of standing and mootness in direct appeals along with an open-ended interpretation of the sixty-day statutory limit on appeals. This brief also responds to the government's supplemental brief regarding this Court's recent decision in *Federated Department Stores, Inc.* v. *Moitie*, No. 79-5017 (June 15, 1981). *Mono-Therm*, together with *Federated Department Stores*, creates a pressing need for the Court to grant certiorari and/or to summarily reverse the Ninth Circuit's ruling in this case.

1. Mono-Therm Industries, Inc. ("Mono-Therm") sought to challenge the validity of the FTC's "Labeling and Advertising of Home Insulation Rule" ("the R-Value Rule"), 16 C.F.R. § 460 (1980), which, like the Franchise Rule, was promulgated by the FTC under Section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a (1976 & Supp. III 1979). The R-Value Rule was promulgated on August 31, 1979; the FTC announced the effective date of the R-Value Rule on August 15, 1980; and the Rule became effective on September 29, 1980.

The FTC assured Mono-Therm "throughout the rulemaking proceeding and thereafter, that [the R-Value] Rule would not go into effect before the GSA adopted [definitions of R-Value which were crucial to understanding the R-Value Rule]." (Appendix at 6a.) During Mono-Therm's year-long delay in appealing the

R-Value Rule, the FTC also "assured [Mono-Therm that] . . . parity would be achieved" among home insulation manufacturers in the definitions. (*Id.* at 8a.) If Mono-Therm had filed an appeal during this period, presumably the FTC would have claimed, as it has here, that no case or controversy existed. The promised definitions "did not materialize" until "about a year later." (*Id.* at 6a.) When petitioner Mono-Therm belatedly found out that it had been placed "at a competitive disadvantage" by the R-Value Rule (*id.* at 7a), it filed an appeal from the Rule to the Tenth Circuit Court of Appeals after the statutory sixty-day period had expired (*id.* at 10a).

Discounting the fact that the FTC had misled Mono-Therm, and citing the requirement that a petition for judicial review of the validity of an FTC rule must be filed within sixty days after the rule's promulgation, 15 U.S.C. § 15a(e)(1)(A), the Tenth Circuit dismissed the action as untimely, stating:

> *Whatever the adequacy of amicable understandings with the FTC, they represent a remedy "truly independent" of time-circumscribed judicial review.* In sum, Mono-Therm's September 26, 1980 review petition, filed more than a year after the R-Value Rule was promulgated, *does not vest this court with jurisdiction to consider its claims.*

Appendix at 10a; emphasis added.

The Tenth Circuit's jurisdictionally-based holding in the *Mono-Therm* case is in direct conflict with the Ninth Circuit's assurance in this case that Petitioner can litigate anew the validity of the Franchise Rule if a later controversy arises concerning franchises which do not involve service stations. Contrary to the Ninth Circuit's holding here that Petitioner can renew its appeal when a controversy arises, in *Mono-Therm* the appellant was not permitted review of the validity of an FTC rule out-

side the sixty-day period even though the FTC had repeatedly assured Mono-Therm that there was no case or controversy within that statutory period. *Sub silentio*, the Tenth Circuit took a different view of the prerequisites for standing than the Ninth Circuit,[a] suggesting that a case or controversy existed during the sixty-day period even though Mono-Therm was uncertain as to the applicability of the R-Value Rule. (*Id.* at 8a.) The *Mono-Therm* holding, whether correct or not, is diametrically opposite from the Ninth Circuit's ruling.

2. In its supplemental brief, the government urges that this Court's decision in *Federated Department Stores, Inc.* v. *Moitie, supra*, is not in conflict with the Ninth Circuit's application of "simple justice" authorizing a future reinstatement of Petitioner's appeal here. Quite the contrary, that case confirms Petitioner's belief that the Ninth Circuit may not have jurisdiction to hear an appeal challenging the validity of the Franchise Rule outside the sixty-day statutory appeal period. The government's attempt to distinguish *Federated Stores* on the ground that it involved a dismissal on the merits ignores the fact that the likelihood of Petitioner obtaining pre-enforcement review of the merits of the Franchise Rule will be *de minimis* if this appeal is dismissed. *Cf. Mono-Therm Industries, Inc.* v. *FTC, supra.*

The government's suggestion that Petitioner may seek review of the validity of the Franchise Rule in an enforcement proceeding likewise ignores the fact that no company would knowingly subject itself to the risk of an enforcement proceeding carrying potential sanctions totalling $10,000 per day per violation solely to obtain review

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[a] The Tenth Circuit commented that there would have been a case and controversy by reason of the Rule's unclear application to *Mono-Therm*: "[I]f this [the R-Value Rule's lack of specificity] was unfair, or even simply too vague, [the Rule] was subject to challenge in August 1979." (*Id.* at 8a.)

of an illegal rule. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Moreover, the government's position on the reviewability of the validity of the Rule in an enforcement proceeding in this case is inconsistent with the positions it is simultaneously advocating in pending enforcement proceedings brought under the Franchise Rule. In *FTC* v. *Marketing Associates, Inc., et al.* (D. Colo. filed July 7, 1981), for example, the government has taken the position that a violation of the Franchise Rule constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[4] *See also FTC* v. *H. N. Singer, Inc.*, Civ. No. 80-3068 (N.D. Cal. March 24, 1981). Similarly, the government's position in *Mono-Therm* as to the availability of review of the validity of a rule after the sixty-day statutory period has run is inconsistent with the government's position on reviewability in this litigation. In *Mono-Therm*, the government stated that once the sixty-day review period has run, a party "may no longer obtain judicial review of the Rule." Respondent's Reply Memorandum in Support of Motion to Dismiss For Want of Jurisdiction at 9, filed July 14, 1981; *FTC* v. *Marketing Associates, Inc., supra.*

The FTC's conduct here represents an unusual and extraordinary effort to evade judicial review of the validity of an FTC trade regulation rule. The failure of this Court to review the Ninth Circuit's dismissal of this litigation or to remand the case to the Ninth Circuit would sanction the FTC's efforts to evade judicial review and would permit it to exceed its powers unchecked by court review.

---

[4] In that case, the FTC also represented that the Franchise Rule is "similar to securities laws" enacted by Congress several decades ago. (Memorandum In Support of Plaintiff's Motion for Preliminary Injunction at 6.) The Franchise Rule, if left unreviewed, will affect a major change on a significant segment of our economy.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflict between the Ninth and Tenth Circuits. In the alternative, a summary remand to the Court of Appeals for the Ninth Circuit for further consideration should issue in light of this Court's contrary decision in *Federated Department Stores, Inc.* v. *Moitie*, *supra*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2113

MONO-THERM INDUSTRIES, INCORPORATED and CON-SERV, a Division of Bay State Gas Company,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

[Filed July 14, 1981]

On Review From the Federal Trade Commission

Submitted on the briefs:

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Before DOYLE, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The FTC has moved to dismiss as untimely a petition filed by Mono-Therm Industries, Inc. and Con-Serv, a Division of Bay State Gas Co. (collectively "Mono-Therm"), for review of a trade regulation rule promulgated by the FTC under section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a.[1] The challenged rule, entitled "Labeling and Advertising of Home Insulation" and commonly known as "the R-Value Rule," governs the labeling and advertising of home insulation products. It appeared in the Federal Register on August 27, 1979.

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[1] Congress enacted section 18 in 1975 as part of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202(a), 88 Stat. 2193 (1975).

See 44 Fed. Reg. 50,218-45 (1979) (codified at 16 C.F.R. § 460 (1980)). By agency regulation, a rule is deemed promulgated four days after publication. *See* 16 C.F.R. § 1.14(d) (1980); *see also id.* § 1.26(d). Thus, the promulgation date for the R-Value Rule is August 31, 1979.

Under 15 U.S.C. § 57a(e)(1)(A), a petition for judicial review of a section 57a rule must be filed within sixty days after promulgation. The only petitions for review filed within sixty days of August 31, 1979 were those of Johns-Manville Corporation, Certanteed Products, and certain others. *See generally Johns-Manville Corp. v. FTC*, No. 79-1955, (10th Cir., petition filed Aug. 31, 1979). Mono-Therm did not file a review petition until September 26, 1980. It did so in the Ninth Circuit Court of Appeals, together with an emergency motion to stay the Rule's effective date, which by then had been set for September 29, 1980. *See* 45 Fed. Reg. 54,702 (1980). The Ninth Circuit denied the stay motion and transferred the entire matter to this court pursuant to 28 U.S.C. § 1112.

Mono-Therm renewed its stay motion in this court and requested further emergency relief from FTC enforcement during the pendency of this appeal. On March 24, 1981, however, the FTC tentatively decided to grant certain cellulose producers, Mono-Therm among them, a partial exemption from the requirements of 16 C.F.R. § 460.5, the essential portion of the R-Value Rule at issue here. *See* 46 Fed. Reg. 18,307, 29,256 (1981). This renders moot Mono-Therm's present request for emergency relief, so that what remains before this court are Mono-Therm's review petition and the FTC's dismissal motion for lack of subject-matter jurisdiction.

Mono-Therm's review petition is clearly untimely unless actions taken by the FTC within sixty days prior to September 26, 1980 amount to rulemaking, because

15 U.S.C. § 57a(e)(1)(A) vests the court of appeals with jurisdiction to review only "rules." Contrary to Mono-Therm's arguments, the events between August 31, 1979, when the R-Value Rule was promulgated, and August 15, 1980, the date Mono-Therm contends the rule was finally promulgated, fail to show any amendatory rulemaking by the FTC. Consequently, we must dismiss Mono-Therm's review petition as jurisdictionally out of time under 15 U.S.C. § 57a(e)(1)(A).

When the R-Value Rule appeared in the Federal Register in August 1979, its primary purpose was described as follows:

> "The primary purpose of the Rule being promulgated today is to correct the failure of the home insulation marketplace to provide . . . essential prepurchase information to the consumer [for home insulation products]. The information will give consumers an opportunity to compare relative insulating efficiencies, to select the product with the greatest efficiency and potential for energy savings, to make a cost-effective purchase, and to consider the main variables limiting insulation effectiveness and realization of claimed energy savings."

44 Fed. Reg. 50,218 (1979). One of those variables limiting insulation effectiveness, and the one at the heart of the present controversy, is "settled density" for loose-fill insulation products.

> "[L]oose-fill cellulosic and mineral wool materials always settle in attics, and will also settle in walls if not installed to the proper density. This settling reduces the R-value [2] of the insulated area."

44 Fed. Reg. 50,228 (1979) (footnote omitted). To prevent this from becoming a source of deception for the

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[2] R-value "is a measure of insulating power, the higher the R-value, the greater the insulating power." 44 Fed. Reg. 50,218 (1979).

consumer, 16 C.F.R. § 460.5 was written to require that R-values for loose-fill materials be tested at "settled density":

> "460.5 R-value tests
>
> "R-values measure resistance to heat flow. R-values given in labels, fact sheets, ads, or other promotional materials must be based on tests done under the methods listed below. They were designed by the American Society of Testing and Materials (ASTM). The test methods are:
>
> ". . .
>
> "(2) For cellulose, the tests must be done at the settled density determined under GSA Specification HH-I-515D.
>
> "(3) For loose-fill mineral wool, the tests must be done on samples that fully reflect the effect of settling on the product's R-value. When a settled density procedure becomes part of a final GSA Specification for loose-fill mineral wool, the tests must be done at the settled density determined under the GSA Specification."

16 C.F.R. § 460.5(a)(2), (3) (1980).

Mono-Therm produces and sells only cellulose insulation. The testing procedure for this material in General Services Administration Specification HH-I-515D is commonly known as the "drop test." Regarding its treatment of cellulose versus mineral wool materials, the FTC explained:

> "This settled density test [the 'drop test'] for cellulose represents a significant technological advance in the art of insulation testing. . . .
>
> "No final settled density testing procedure has yet been accepted for loose-fill mineral wool. How-

> ever, the mineral wool manufacturers contend that the coverage charts for their loose-fills take settling into account, and that if the coverage information is followed, the consumer will attain the represented R-value. Under these circumstances, *the Commission is presently imposing a general requirement that loose-fill mineral wool R-values be based on tests that take the adverse effects of settling into account.* In addition, section 460.5(a) of the Rule states that as soon as a settled density test for loose-fill mineral wool becomes part of a final GSA Specification, R-value tests for that product must be done at the settled density determined under the GSA Specification."

44 Fed. Reg. 54,228 (1979) (emphasis added) (footnote omitted).

Thus, the August 1979 promulgation of the R-Value Rule reflects a contemplation that the General Services Administration would adopt some specification in the future and that a settled-density testing procedure for mineral wool insulation would be included in such specification. Mono-Therm contends that the FTC assured it, throughout the rulemaking proceeding and thereafter, that the Rule would not go into effect before the GSA adopted the contemplated specification. Whatever the merit of that contention, however, such specifications did not materialize before the FTC finally announced about a year later, on August 15, 1980, that section 460.5 would become effective on September 29, 1980. *See* 45 Fed. Reg. 54,702 (1980).

The effective date of the R-Value Rule had originally been announced as November 30, 1979. But this was stayed first by the FTC itself and then by Congress, until May 31, 1980. *See id.* In early June 1980, the FTC invited public comment on its proposal to further stay certain provisions of the R-Value Rule, other than

section 460.5, in connection with the *Johns-Manville* appeal, No. 79-1955 (10th Cir., petition filed Aug. 31, 1979). On August 15, 1980, the FTC announced that provisions not stayed in connection with that appeal would become effective September 29, 1980.

Mono-Therm reacted by submitting to the FTC a petition "to Stay the Commission's Rule on Home Insulation for the Purpose of Taking Additional Evidence." In a lengthy letter, the FTC on September 25, 1980 denied this petition in all respects. Mono-Therm's instant appeal followed.

Mono-Therm's review petition, as amplified by its filings in this court, claims essentially that the R-Value Rule unfairly discriminates against cellulose producers like Mono-Therm and in favor of its competitors, mineral wool producers. More specifically, Mono-Therm contends that the rule, as finally made effective, places cellulose producers at a competitive disadvantage relative to mineral wool producers because section 460.5 unfairly imposes disparate testing requirements on each group regarding settled density; section 460.6 does the same for representative thickness testing; and section 460.12(b) unfairly imposes disparate disclosure requirements. Mono-Therm also contends that the rulemaking proceeding on the R-Value Rule was tainted by improper *ex parte* communications between the FTC and others, and by the FTC's improper delegation of its rulemaking authority to other federal agencies.

In support of its claim that this court has jurisdiction to consider all these matters, Mono-Therm raises essentially two contentions: first, FTC action in August 1980 amounted to an amendment of the R-Value Rule under 15 U.S.C. §§ 57a(d)(2)(B), (e)(1)(A), and second, the FTC's September 1980 refusal to reopen the rulemaking

record is in any event judicially reviewable in this court for abuse of discretion under the Administrative Procedure Act. Neither contention is correct.

Regarding the first contention, Mono-Therm argues that even through the R-Value Rule may have been originally promulgated in August 1979, it was effectively amended when no GSA specification materialized, as expressly contemplated by section 460.5(a)(3), to impose the same settled-density testing requirement on mineral wool insulation as section 460.5(a)(2) imposed on cellulose. Mono-Therm contends that the FTC had assured such parity would be achieved before section 460.5 became effective, so that the FTC's August 15, 1980 announcement effectively worked an amendment to the R-Value Rule, which under section 57a(d)(2)(B) started the 60-day period anew. Under this view, Mono-Therm's review petition filed September 26, 1980 would be timely. The flaw in this view, however, is that Mono-Therm knew as of August 1979 what the R-Value Rule said; the text of section 460.5 was not altered between August 31, 1979 and August 15, 1980. Whatever disparity may inhere in the section was just as apparent in August 1979 as in August 1980. Admittedly, section 460.5(a)(3) has a built-in gap that looks to the GSA to fill in the testing procedure that mineral wool producers must conduct for settled density. The gap notwithstanding, mineral wool producers are required to "fully reflect the effect of settling" on their products' R-Value. If this was unfair, or even simply too vague, section 460.5 was subject to challenge in August 1979. *See* 15 U.S.C. § 57a(a)(1)(B) (conferring power on FTC to prescribe "rules which define *with specificity* acts or practices which are unfair . . ." (emphasis added)); *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979) (challenge sustained against FTC rule for lack of adequate specificity). Sections 460.6 and 460.12 were subject to challenge *a fortiori*

because these sections incorporate no gaps into their requirements.

The only FTC actions regarding the R-Value Rule between August 1979 and August 1980 were administrative stays of the Rule's effective date. Such FTC action is not reviewable in this court under 15 U.S.C. § 57a(e), for it is not rulemaking. In addition, nothing in section 57a(e) suggests that the effective date of a promulgated rule triggers anew the 60-day appeal period that began on the promulgation date. Rather, the statute says clearly that a review petition, to be timely, must follow within 60 days after the promulgation date. Thus, administrative stays of a rule's effective date neither toll nor reset the running of the appeal period for an FTC rule that is otherwise reviewable.

Mono-Therm itself recognizes that the R-Value Rule was subject to judicial review in August 1979. *See* Affidavit of Noel W. Lane, Jr., at ¶ 4, p. 2 (Sept. 19, 1980) (Lane aware as early as Aug. 31, 1979, of asserted disparity in testing requirements for cellulose versus mineral wool). Mono-Therm claims, however, that it believed it "unnecessary and contrary to their best interests to seek either judicial or legislative review of the Rule" because the FTC promised parity in testing requirements, presumably via the GSA specification, before making the Rule effective. *See* Supplemental Petition for Emergency Stay ¶ 6 (10th Cir., filed Oct. 23, 1980). Whatever the promises, if any, they could not toll the 60-day period of 15 U.S.C. § 57a(e)(1)(A). Mono-Therm's present position is somewhat analogous to that of the petitioner in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), who let the limitations period run on his civil rights action under 42 U.S.C. § 1981 because he apparently believed it more in his interest to pursue an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. When he finally

tried to pursue his by then time-barred § 1981 action, the Supreme Court repelled his effort:

> "Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his § 1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent."

Id. at 466. Here, Mono-Therm slept on its § 57a(e)(1) rights. Whatever the adequacy of amicable understandings with the FTC, they represent a remedy "truly independent" of the time-circumscribed judicial review. In sum, Mono-Therm's September 26, 1980 review petition, filed more than a year after the R-Value Rule was promulgated, does not vest this court with jurisdiction to consider its claims.

Mono-Therm's second contention, that the FTC's September 25, 1980 refusal to reopen the record is reviewable in this court under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, is also incorrect. The APA does not provide an independent basis of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). In the case of a timely petition directed to the court of appeals for review of an FTC rule, the independent jurisdictional predicate comes from 15 U.S.C. § 57a. But Mono-Therm's untimeliness precludes that here.

Had the FTC actually amended the R-Value Rule in response to Mono-Therm's request,[3] Mono-Therm would

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[3] 15 U.S.C. § 57a(b) provides that when the FTC is engaged in rulemaking, "it shall proceed in accordance with" 5 U.S.C. § 553 of the APA. Section 553(e) says, "Each agency shall give an

have had sixty days in which to appeal the amended rule. *See* 15 U.S.C. § 57a(d)(2)(B). But the FTC refused to even reopen the rulemaking proceeding. Such a decision is not reviewable in this court. *Cf. Kennecott Copper Corp. v. FTC*, 542 F.2d 801, 803-04 (10th Cir. 1976) (FTC's refusal to reopen or modify divestiture order under 15 U.S.C. § 21 not appealable); *Love Television & Stereo Rental, Inc.* [sic], 498 F.2d 1088 (5th Cir. 1974) (per curiam) (same; cease and desist order); *Rettinger v. FTC*, 392 F.2d 454, 457 (2d Cir. 1968) (same; consent order under 15 U.S.C. § 45); *Martin Marietta Corp. v. FTC*, 376 F.2d 430, 433-34 (7th Cir.)[, *cert. denied*, 389 U.S. 923 (1967) [sic] (same; divestiture and consent order under 15 U.S.C. §§ 21, 45).

In view of the foregoing, Mono-Therm's review petition is jurisdictionally out of time and must be dismissed.

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interested person the right to petition for the issuance, amendment, or repeal of a rule." An unreasonable refusal to engage in rulemaking is generally reviewable in the district courts under the APA and federal question jurisdiction. *See generally Nader* v. *FAA*, 440 F.2d 292 (D.C. Cir. 1971); 1 K. Davis, Administrative Law Treatise § 6.28, at 586-88 (2d ed. 1978); *see also Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 614-16, 618-22 (D.C. Cir. 1979) (discussion of jurisdictional relationship between APA and 15 U.S.C. § 57a).

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No. 80-1895

In the Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's challenge to a trade regulation rule failed to present a live case or controversy subject to judicial review in light of petitioner's failure to allege how the rule could have any effect on its business operations.

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing the petition for review (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1980. A petition for rehearing was denied on February 9, 1981 (Pet. App. 8a). The petition for a writ of certiorari was filed on May 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 21, 1978, the Federal Trade Commission promulgated a trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (16 C.F.R. Part

436, 43 Fed. Reg. 59614 (1978)).[1] The Rule seeks to prevent unfair and deceptive acts and practices that the Commission found to be prevalent in the sale of franchises and business opportunity ventures. It requires franchisors to disclose to prospective franchisees certain material facts regarding the franchisor, the business to be franchised, and the terms of the proposed franchise relationship. 16 C.F.R. 436.1(a). The Rule also requires a franchisor to have a "reasonable basis," supported by documentation, for any claims of potential earnings or past earnings of franchise outlets before it makes any such claims to prospective franchisees. 16 C.F.R. 436.1(b), (c), and (e). The Rule became effective October 21, 1979 (44 Fed. Reg. 49966).

Petitioner Exxon Corp. was one of a number of companies that petitioned for review of the Rule pursuant to Section 18(e) of the Federal Trade Commission Act, 15 U.S.C. 57a(e). Exxon is engaged, *inter alia*, in the franchising of retail gasoline stations. In its submissions to the court of appeals, Exxon did not state with specificity its ground for asserting standing to seek review of the Rule. It argued in its briefs, *inter alia*, that no rule was necessary to prevent abuses in the conduct of its business because its relationship with its franchised dealers already was regulated by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. (Supp. III) 2801 *et seq.* (Joint Brief for Exxon, *et al.*, at 29 n.26).

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[1]The Rule was promulgated pursuant to the Commission's rulemaking authority under Section 18(a)(1) of the FTC Act, 15 U.S.C. 57a(a)(1). Section 18(a)(1)(B), 15 U.S.C. 57a(a)(1)(B), authorizes the Commission to "prescribe * * * rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of * * * section 5(a)(1) of [the FTC] Act [15 U.S.C. 45(a)(1)])," and also provides that such rules "may include requirements prescribed for the purpose of preventing such acts or practices."

While the petition for review was pending, Exxon and other petroleum companies filed with the Commission a request for exemption from the Rule pursuant to Section 18(g) of the FTC Act (15 U.S.C. 57a(g)). The request stated that an exemption should be granted because the PMPA "regulates all significant aspects of the relationships between petroleum companies and their dealers" (Exxon, *et al.*, Memorandum of Aug. 18, 1980, Exh. C, at 5). Exxon did not attempt to justify an exemption with respect to any businesses other than those covered by the PMPA, nor did it mention any such businesses that it believed might be covered by the Commission's Rule.

On July 17, 1980, the Commission issued an order in which it accepted the argument that application of the Rule to activities covered by the PMPA was unnecessary, and accordingly exempted from all aspects of the Rule the sale or promotion of "franchises" as defined in the PMPA (Pet. App. 2a-6a). The Commission thereafter moved in the court of appeals to dismiss Exxon's petition for review without prejudice on the ground that the Commission's exemption mooted the controversy with respect to business activities subject to the PMPA, and that Exxon had not alleged that the Rule would have any effect on its other business operations. Exxon opposed the Commission's motion, contending that it was entitled to a blanket exemption for *all* businesses it *might* engage in, and not only those covered by the PMPA. It refused, however, to identify or describe any such additional businesses. The court of appeals dismissed Exxon's petition for review "without prejudice to the right of [Exxon] to contest the validity of the rule or its application in any appropriate future proceeding" in which a live "case or controversy" might be presented (Pet. App. 1a).

ARGUMENT

1. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review. The

court of appeals' decision rests on the established principle under Article III of the Constitution that a party seeking judicial review must allege such a "personal stake in the outcome of the controversy" (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)) as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" (*Flast* v. *Cohen*, 392 U.S. 83, 101 (1968)). See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975); *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 20-21. In the court below, Exxon failed to allege facts showing that it will be adversely affected in any respect by the Rule's requirements. Indeed, nowhere in its petition in this Court does Exxon identify any concrete interest injured or threatened by the Commission's rule that would serve as a predicate for invoking the judicial power. Such an interest is an indispensable requirement for judicial review under Article III. *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 685 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Ashcroft* v. *Mattis*, 431 U.S. 171, 173 (1977); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978).

Exxon attempts in its petition, as it did in its submissions in the court of appeals, to treat the Commission's exemption of businesses covered by the PMPA as an assertion by the Commission that all of petitioner's other businesses are covered by the Rule.[2] This line of argument is without

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[2]Exxon asserts (Pet. 6, 15, 19, 20, 21) that the Commission has taken the position that certain of its other business activities are covered by the Rule. These assertions apparently are based on the fact that the exemption applies only to businesses covered by the PMPA. To the extent Exxon's assertions may seem to rest on some affirmative statement by the Commission or its staff respecting the Rule's application to

merit. Neither the Commission nor the courts can make such a determination absent some identification by Exxon of business activities that might arguably be covered by the rule. Such an identification would not, as Exxon seems to contend, amount to a concession of coverage, but rather would serve as an allegation of a concrete interest entitling it to review. Of course, it is the duty of the party seeking to invoke the jurisdiction of an Article III court to allege specific facts showing that it has suffered " 'distinct and palpable injury' " that is likely to be redressed if relief is granted. *Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100. And it is the absence of any alleged impact on any of petitioner's businesses that formed the basis for the court of appeals' order of dismissal.

2. Exxon invokes Section 18(e)(1)(A) of the FTC Act, 15 U.S.C. 57a(e)(1)(A), to support the argument that the court of appeals erred in denying preenforcement review (Pet. 8-14). However, the statute does not purport to and could not grant such a right to those who lack standing under Article III. See *Gladstone, Realtors, supra*, 441 U.S. at 100. The statute simply provides that review of a Commission trade regulation rule may be sought by "any interested person (including a consumer or consumer organization)." There is no indication, in either the statute or the legislative history, that by this language Congress intended to broaden the category of persons who could seek review beyond that permitted by the Administrative Procedure Act (see *Sierra*

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any of Exxon's other businesses, the assertions are totally inaccurate. Indeed, as the Commission advised the court of appeals (Memorandum of Sept. 2, 1980, at 3, 4, 11, 21; Memorandum of Oct. 10, 1980, at 4, 5, 11; Memorandum of Oct. 29, 1980, at 1-2), it knows of no other businesses of Exxon that might be covered by the Rule—and Exxon has identified none. Another oil company, Marathon Oil Co., did in fact request the Commission's views as to some of its other businesses. It received an advisory opinion that such businesses were not covered by the Rule (Memorandum of Oct. 10, 1980, at 1-2).

Club v. *Morton, supra*, 405 U.S. at 731-740).[3] Nor should it be assumed that Congress intended to go beyond the "minimum constitutional mandate" that "[a] federal court's jurisdiction * * * can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action * * *.' " *Warth* v. *Seldin, supra*, 422 U.S. at 499; see also *Buckley* v. *Valeo*, 424 U.S. 1, 11 (1976); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Sierra Club* v. *Morton, supra*, 405 U.S. at 732 n.3.

Exxon further argues (Pet. 9-10) that, if it should achieve standing to seek judicial review at some future time, it may then enjoy fewer rights than those afforded in the direct review proceeding provided under the FTC Act. However, the fact that Congress has provided for statutory review following promulgation of a rule does not support the conclusion that standing must be found to exist with respect to every petitioner, even if that petitioner has no concrete interest in the review proceeding. Exxon's rights in this respect are no different from those of any other person who cannot establish standing to sue during the period immediately following promulgation of a rule. If, at some time in the future, such a person engages in activities subject to the Rule, or is otherwise able to allege facts sufficient to predicate standing, it may then, as the court of appeals noted (Pet. App. 1a), "contest the validity of the rule or its application in any appropriate future proceeding."[4]

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[3]The Act does afford standing to "interested persons" who are consumers or consumer groups, but that reference has no application to petitioner.

[4]The precise extent of the remedies available in such a future proceeding is, of course, not at issue here. However, future avenues of review may include: (1) judicial review of the Rule in an FTC enforcement proceeding; (2) declaratory relief from the FTC under 5 U.S.C. 554(e), which may, in appropriate cases, be subject to judicial review (*Frozen*

3. Contrary to Exxon's contention (Pet. 15-22), the court of appeals' decision is consistent with the decisions of this Court and the other circuits dealing with mootness issues.[5] Exxon's argument is premised upon its erroneous factual assertion that the Commission considers certain of its business activities to be covered by the Rule (Pet. 6, 15, 19, 20, 21). That assertion, as previously noted (see note 2, *supra*), is unfounded. Exxon's refusal to identify any aspect of its business operations that is currently affected by the Rule renders this case factually distinguishable from the cases on which Exxon relies.[6]

Food Express v. *United States*, 351 U.S. 40 (1956)); and (3) exemption proceedings under Section 18(g) of the FTC Act (15 U.S.C. 57a(g)), which are subject to judicial review (Section 18(g)(3), 15 U.S.C. 57a(g)(3)).

[5]The doctrines of standing to seek review and mootness are closely related in this context. The only basis for standing advanced by petitioner was removed by the Commission's exemption order. Since petitioner has declined to identify any other aspect of its business that would be adversely affected by the challenged rule, the court of appeals properly treated the petition as moot. "Mootness is * * * the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973).

[6]Exxon cites nine cases in which this Court has rejected claims of mootness. None of those cases involved a permanent and unqualified exemption from the challenged regulation of the identifiable business activities of the complaining party. *Powell* v. *McCormack*, 395 U.S. 486 (1969) (case not moot because of remaining unresolved claim for unpaid salary); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968) (dissolution of association in light of new regulations did not moot suit for injunctive relief because, even under the new regulations, the members would be free to engage in illegal conduct); *Gray* v. *Sanders*, 372 U.S. 368 (1963) (case not rendered moot by holding of primary election when the challenged statute remained in effect); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944) (substitution of new compensation plans for old plans did not moot the case because respondent continued to urge the validity of the old plans and was free to resume use of those plans); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (dissolution of association did not moot government suit to restrain similar action under a

Nor does this case fall within the exceptions to the mootness doctrine cited by Exxon (Pet. 16-19). It does not present a situation in which the defendant has temporarily ceased illegal conduct. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The petition for review here is moot because the agency has granted a formal and continuing exemption that removes all of petitioner's identifiable business activities from the purview of the challenged rule. See *Defunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979). Similarly, this case does not fall within the exception applicable when the challenged official conduct is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In the absence of a class action, this doctrine is limited to situations in which (1) the challenged conduct is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the complaining party will be subjected to the same conduct again. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Here, the Franchise Rule remains in effect and, should Exxon ever identify any interest that arguably might be affected by it, it has available the avenues of judicial review described above. Like the plaintiff in *Weinstein*, Exxon has, up to now, pointed to nothing indicating that it will ever again be subjected to the Rule.

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similar illegal agreement); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974) (settlement of labor dispute did not moot case challenging a continuing policy applicable to such disputes); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (expiration of ICC order did not moot challenge to the order when carriers were subject to other short-term orders of the same kind); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (class action not necessarily mooted if members of the class have a concrete interest that endures after expiration of the interest of the

In sum, Exxon fails to meet the threshold Article III requirement that "the claimant must have a 'personal stake in the outcome,' * * * or a 'particular, concrete injury,' "—as opposed to " 'generalized grievances' " about the conduct of the government. *United States* v. *Richardson*, 418 U.S. 166, 179-180 (1974). As this Court has emphasized, "[t]he requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

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named plaintiff); *Roe* v. *Wade*, 410 U.S. 113 (1973) (natural termination of plaintiff's pregnancy did not moot challenge to abortion statute because pregnancy is capable of repetition).

Likewise, the court of appeals decisions relied on by Exxon are irrelevant here. In *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977), the court held that mere assurances by the government of its enforcement plans with respect to a challenged regulation were insufficient to render the case moot, particularly where the statute in question provided for citizen suits. Here, in contrast, Exxon has received a formal statutory exemption. In *Big Rivers Electric Corp.* v. *EPA*, 523 F. 2d 16 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court of appeals held that compliance by a state with EPA regulations did not moot review petitions filed by other parties. Here, there is no issue of compliance by other parties. Rather, Exxon's exemption from the challenged Rule makes its petition moot. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F. 2d 390, 404 (5th Cir. 1974), rev'd on other grounds, 421 U.S. 60 (1975), held that administrative action that fails to afford complete relief sought by the complaining party does not moot the controversy. In this case, in contrast, Exxon was exempted from the Rule on the very ground it urged upon the Commission. It has failed to identify any other respect in which the Rule affects its business. Finally, in *Nader* v. *Volpe*, 475 F. 2d 916 (D.C. Cir. 1973), the court granted review of challenged administrative action that was capable of repetition but evaded review. Here, in contrast, both the Franchise Rule and Exxon's exemption from it are still in effect and are, by their terms, indefinite in duration.

Sierra Club v. *Morton, supra*, 405 U.S. at 740. On the record in this case, Exxon has failed to allege such a direct stake.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1895

In the Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

In its reply brief in support of its petition for a writ of certiorari, Exxon argues that the present case should be remanded for reconsideration in light of this Court's recent decision in *Federated Department Stores, Inc.* v. *Moitie*, No. 79-1517 (June 15, 1981), which was handed down after the Commission filed its brief in opposition.

This Court's decision in *Federated* is not relevant to the issues raised in Exxon's petition. That case was controlled, in the Court's words, by "accepted principles of *res judicata*." Slip op. 5. Those same accepted principles of *res judicata* establish that the court of appeals' order in this case would not bar

Exxon from obtaining review of the Commission's Franchise Rule if and when Exxon can show that a justiciable case or controversy has arisen between it and the Commission. It is well settled that dismissal of an action is *res judicata* only as to matters actually adjudged. *Smith* v. *McNeal*, 109 U.S. 426, 429 (1883); see generally *Restatement of Judgments* § 49 (1942); 1B *Moore's Federal Practice* ¶¶ 0.405[5], 0.409[1], 0.415 (Supp. 1980-1981). Here, the court of appeals took pains to make clear that its dismissal was not on the merits, stating expressly that the order was "without prejudice to the right of [Exxon] to contest the validity of the rule or its application in any appropriate future proceeding" (Pet. App. 1a). See generally *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, 626 (1941) (dismissal of counterclaim "without prejudice" is not dispositive of the claim on the merits).

Federated is irrelevant here for the additional reason that this case involves a Commission rule, not a private antitrust suit. The right to seek review of such a rule in an enforcement proceeding is expressly preserved by statute. Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 703, provides that "[e]xcept to the extent that prior, adequate and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." Moreover, Section 18(e)(5)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(e)(5)(B), excepts district court enforcement proceedings from the exclusive jurisdiction of the courts of appeals to review trade regulation rules.[1] Accordingly, the court

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[1] Section 18(e)(5)(B) provides in pertinent part (emphasis added):

of appeals' determination that no "case or controversy" currently exists between the Commission and Exxon with regard to the Franchise Rule does not diminish Exxon's statutorily protected right to obtain review of that rule if an enforcement proceeding is ever brought against it. In such a proceeding, a "case or controversy" clearly would exist.[2] By contrast, in the present case, Exxon has identified no activity that it currently engages in that might be affected by the rule and therefore has failed to allege an actual case or controversy with the Commission.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1981

The United States Court of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (*other than in an enforcement proceeding*) of a rule prescribed under subsection (a)(1)(B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

[2] As noted in the Commission's Brief in Opposition (at 6-7 n.4), other avenues of review also may be available if and when a case or controversy arises.

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FURTHER SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FURTHER SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

Exxon, in its most recent submission, has misstated a fact upon which it heavily relies. In arguing that the Commission's position in this case "is inconsistent with the positions it is simultaneously advocating in pending enforcement proceedings brought under the Franchise Rule" (Supp. Mem. 5), Exxon cites *FTC* v. *Marketing Associates, Inc.*, No. 81-1173 (D. Colo. July 7, 1981), and represents that "[i]n that case" the Commission "stated that once the sixty-day review period has run, in an enforcement action a party 'may no longer obtain judicial review of the Rule' " (*ibid.*).

In fact, the Commission made no such statement in that case or in any other enforcement action. Contrary to Exxon's citation, the quoted words appear, not in any document filed in *Marketing Associates,* but in the Commission's reply memorandum filed December 24, 1980, in *Mono-Therm, Industries, Inc.* v. *FTC,* No. 80-2113 (10th Cir. July 14, 1981), a statutory pre-enforcement review proceeding brought under Section 18(e) of the Federal Trade Commission Act, 15 U.S.C. 57a(e). In *Mono-Therm,* the Commission argued, and the Tenth Circuit held, that an attempt to obtain such pre-enforcement review in the court of appeals pursuant to Section 18 was untimely where the petition was filed outside the 60-day period provided by Section 18. The availability of review in an enforcement proceeding was not discussed in *Mono-Therm,* and the quoted language, read in context, clearly refers to pre-enforcement review.

For these reasons and those we have previously stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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IN THE

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v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

This reply brief addresses new matters occurring since Petitioner's original filing, as well as the arguments raised in the Federal Trade Commission's ("FTC") brief in opposition.

I. SINCE PETITIONER'S ORIGINAL FILING, THIS COURT IN *FEDERATED DEPARTMENT STORES, INC.* v. *MOITIE* HAS CONFIRMED THAT THERE EXIST SERIOUS DOUBTS ABOUT WHETHER PETITIONER CAN EXPECT ANY FURTHER RELIEF FROM THE NINTH CIRCUIT DESPITE THE TERMS OF ITS ORDER

When the Ninth Circuit dismissed Petitioner's appeal from the Franchise Rule, it did so with the comment: "The petitions for review . . . are dismissed, without prejudice to the right of the petitioners to contest the validity of the rule on its application in any future

proceeding." (Appendix A to Petition.) As indicated in Petitioner's initial brief, there exists substantial doubt as to the authority of the Ninth Circuit to render a dismissal of this case on appeal on the merits "without prejudice."

Subsequent to the filing of this petition for a writ of certiorari, this Court decided *Federated Department Stores, Inc.* v. *Moitie*, 49 U.S.L.W. 4687 (U.S. June 15, 1981), a case arising out of the Ninth Circuit involving a specific application of that court's questionable approach toward the final effect of a dismissal. In *Federated*, the Ninth Circuit applied a *"simple justice"* concept to permit an otherwise dead appeal to possess continuing vitality, similar to the objective the Ninth Circuit sought to accomplish with its order here. Of major significance to the instant proceeding, this Court in *Federated* overruled the Ninth Circuit in light of the basic rule of *res judicata* which precludes a party or its privy from relitigating issues that were or could have been raised in the original action, stating:

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

49 U.S.L.W. at 4689. Similarly here, the Magnuson-Moss Act, which provided the statutory basis for Petitioner's appeal from the Franchise Rule, provides that an appeal must be filed within 60 days and that certain procedural and evidentiary aspects of a rule "may be reviewed only in [such] a proceeding." (*See* Appendix E at 15a-17a of the Petition.)

The Court's holding in *Federated* may create an irreconcilable conflict with the Ninth Circuit's statement in

its Order that the validity of the Franchise Rule could be "litigated anew" if another case or controversy arises concerning the sale of franchises other than service stations. Unless the Court hears this petition and instructs the Court of Appeals for the Ninth Circuit to correct its erroneous dismissal of this litigation, later courts facing the issue of the validity of the Franchise Rule in "any future proceeding" may be powerless to correct the manifest injustice caused by the Ninth Circuit's dismissal.

II. THIS CASE HAS SIGNIFICANT IMPLICATIONS AS TO THE ABILITY OF THE JUDICIARY TO EFFECTIVELY REVIEW AGENCY ACTION

The FTC has not challenged, nor can it challenge, Petitioner's assertion that the Franchise Rule was illegally promulgated.[1] Nor does it deny that it has systematically tried to evade judicial review. In the course of formulating the Rule, the FTC accumulated more than 10,000 pages of secret comments from franchisors whose economic interests differ from Petitioner's interests regarding the merits of the Franchise Rule. Petitioner was never provided an opportunity to comment on the substance of any of these *ex parte* contacts prior to the promulgation of the Franchise Rule. If the FTC's strategy of systematically evading judicial review prevails, and the Ninth Circuit's Order remains unreviewed, it is possible that no court will ever have the opportunity to review an illegal substantive rule governing a significant segment of the economy.

The FTC persists in its evasionary tactics, characterizing its July 17, 1980 Exemption Order as "permanent and unqualified." (Brief for the FTC in Opposition at 7 n.6.) But the FTC glosses over the fact that the ex-

[1] For purposes of determining whether this litigation is moot, the court should accept as true all of Petitioner's material allegations. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

emption is not all encompassing. The illusion of a complete exemption created in the FTC's brief equates the FTC's exemption proceeding (which is not part of this appeal) with the appeal here which involved *all of Petitioner's business operations.* As to the non-service station operations of Petitioner, the FTC asserts only that "it knows of no other businesses of Exxon that might be covered by the Rule. . . ." (Brief for the FTC in Opposition at 5 n.2.)

Such qualified assurances simply cannot moot an appeal under longstanding precedent in this Court and in the lower courts. Under the Commission's own procedural rules, informal advice given by the FTC is not final, but is "without prejudice to the right of the Commission to reconsider the questions involved. . . ." FTC *Organization, Procedures, Rules of Practice, and Standards of Conduct* § 1.3(b) (rev. Feb. 20, 1979).[2] *See Grubb* v. *Oliver Enterprises, Inc.*, 358 F. Supp. 970 (N.D. Ga. 1972). If the FTC is successful in blocking judicial review of the Franchise Rule on the basis of a qualified and non-binding opinion, there will be nothing to bar the agency from deciding that the Rule is applicable to Petitioner[3] at a later point in time when the 60-day statutory period for direct appeals has run.

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[2] The rule provides in pertinent part:

> *Any advice* given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action.

Id. (emphasis added).

[3] One such shift in views has already occurred here. On October 5, 1979, the FTC issued an informal advisory opinion to Marathon Oil Company concluding that rental payments made by Marathon's branded independent service station dealers and jobbers pursuant to Service Station Leases and Jobber Leases would be considered "required payments" as that term is used in the Franchise Rule.

The FTC does not dispute that the judicial review provisions of the Magnuson-Moss Act were considered by Congress to be crucial. (*See* Petition at 8-13.) Under the Ninth Circuit's Order, the FTC has thus far wholly frustrated a serious challenge to the validity of the Franchise Rule simply by offering non-binding advice. The Ninth Circuit's opinion provides the FTC with the same type of "powerful weapon against public law enforcement" condemned by the Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

III. A PARTIAL AND NON-BINDING OPINION DOES NOT RENDER PETITIONER'S CHALLENGE TO THE VALIDITY OF THE FRANCHISE RULE MOOT

The purpose of Petitioner's suit was to challenge the serious procedural violations engaged in by the FTC in promulgating the Franchise Rule and the total lack of any evidentiary support for it. Petitioner argued, *inter alia*, that the Rule was invalidly promulgated, and that Petitioner was illegally denied participation in certain crucial meetings pertaining to the contents of the Rule. To date, the only relief which Petitioner has received is a partial exemption and some qualified advice. It cannot be said that because of such limited relief, "the issues presented are no longer 'live' or [that] the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).[4] Such advice

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Less than one year later, on September 30, 1979, the FTC concluded that such payments, to the extent they had not been exempted by virtue of the July 17, 1980 Exemption Order, did *not* constitute "required payments."

[4] The numerous standing cases cited by the FTC do not suggest a contrary conclusion. A party has standing whenever it "has

clearly fits within the doctrine of conduct which is "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Voluntary cessation of the challenged conduct does not render a

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suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), *quoting Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). The impact of the Rule on Petitioner's daily business operations and the inevitable impact on new business opportunities alone is sufficient injury to give Petitioner standing. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

Standing can also be established when a legal interest created by a statute is invaded, even if there would be no injury without such a statute. *Warth* v. *Seldin*, *supra*, at 500; *Linda R.S.* v. *Richard D.*, *supra*, at 617 n.3; *Trafficante* v. *Metropolitan Life Ins. Co.*, *supra*, at 212. In this case Petitioner has alleged injury from a violation of certain provisions of the Administrative Procedure Act which has in no way been remedied by the FTC's Exemption Order. The Exemption has done nothing to repair the deprivation of Petitioner's right to participate fully in any presentation of evidence concerning the contents of the rule being promulgated by the FTC. 5 U.S.C. §§ 553, 556 (1976 & Supp. III 1979).

Further, the FTC's argument that Petitioner does not have standing is in direct conflict with the basic principle that a party should not have to subject itself to the risk of an enforcement proceeding in order to obtain judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (a party can challenge a statute prior to its effective date when it is inevitable that the party will be affected by the statute); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (suit to challenge statute was not premature, although it was brought before the statute's effective date); *McCoy-Elkhorn Coal Corp.* v. *EPA*, 622 F.2d 260 (6th Cir. 1980) (suit challenging certain proceedings under the Clean Air Act was proper before the termination of the proceedings because their very existence was impairing business opportunities); *Crossen* v. *Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971) (litigants need not subject themselves to the possible harm of a criminal prosecution before seeking relief from an allegedly unconstitutional statute).

controversy moot. *United States* v. *W. T. Grant Co.*, *supra*. The burden of establishing that the challenged wrong will not be repeated is a heavy one, *Ciudadanos Unidos de San Juan* v. *Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 825 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1479 (1981), and the FTC has failed to meet that burden. The FTC repeatedly refused to stipulate with Petitioner that it will not apply the Franchise Rule to any of Petitioner's businesses. Nowhere in its brief does the FTC state unqualifiedly that the Franchise Rule will never be applied to Petitioner's business. If the party claiming mootness fails to establish that there is no "reasonable expectation" that the alleged violation will recur, the case is not moot. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

Despite the limited exemption and the FTC's tentative advice as to Petitioner's other business endeavors, Petitioner must make business decisions daily in structuring its various operations which the FTC may later claim are significantly impacted by the Rule. Under Section 18(e)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979), "*any interested person (including a consumer or consumer organization)*" has a right to challenge the validity of a rule promulgated by the FTC. (Emphasis added). Certainly Petitioner, who operates many businesses which may be challenged under the Rule, cannot have less of a "legally cognizable interest" in the validity of the Rule than a consumer or an organization of consumers.[5]

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[5] Indeed, even if the Ninth Circuit determined that the Franchise Rule was moot as to its businesses, Petitioner would still retain the right to challenge the validity of the Rule as a consumer since it purchases many services from franchises, *e.g.*, rental cars, temporary employees. Although the FTC cavalierly dismisses this idea (FTC Brief in Opposition at 6 n.3), it ought to be beyond dispute that a corporation the size of Exxon would have standing either as an "interested" person or as a consumer under this statutory provision. 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, Petitioner seeks a summary remand to the Court of Appeals for the Ninth Circuit for further consideration in light of the Court's decision in *Federated Department Stores, Inc.* v. *Moitie, supra.*

Respectfully submitted,

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